

ATTACHMENT 1

TDS METROCOM, INC.

TDS METROCOM, INC. ("TDS Metrocom") is a successful, facilities-based provider of local voice, long distance and broadband data services to residential and business customers located in small and medium-sized markets throughout Illinois, Michigan and Wisconsin.

Characteristic	Description
Funding:	TDS Metrocom is not run by short-term venture capital money. Our company receives its funding directly from its corporate parent, TDS Telecom, Inc., which also owns 106 ILECs serving predominantly rural areas in 28 states.
Market Segment:	Like many other carriers, TDS Metrocom provides local voice, long distance and broadband data services to small and medium-sized businesses, as well as to residential customers. Of our 160,000 lines, over 75,000 are residential. (In comparison, Ameritech has over 14 million lines in Illinois, Michigan and Wisconsin.) In addition, we operate over 8,000 active DSL lines, 5,500 of which are residential.
Geographic Focus:	TDS Metrocom serves small and medium-sized cities that many larger CLECs have ignored. For example, our company serves the Wisconsin communities of Appleton, Beloit, Depere, Fond Du Lac, Green Bay, Janesville, Middleton, Neenah, Oshkosh, Pewaukee and Stoughton, as well as a number of communities under 10,000 in population. The actual density of the customers served in our market areas is more similar to that of independent ILECs than to that of the RBOCs. TDS Metrocom operates 71 active lines per square mile in S. Central Wisconsin, 34 active lines per square mile in NE Wisconsin, and 9 active lines per square mile in SE Wisconsin.
Product Focus:	TDS Metrocom offers broad array of telecommunications services, which includes local voice, long distance, and broadband data services such as DSL.
Growth:	Although we are growing lines by nearly 100% each year, our expansion is well managed and limited to what our operations support systems can realistically digest. Our company plans to expand its operations into Indiana and Ohio, however, only to the extent adequate returns are projected.
Provisioning Method/Facilities:	TDS Metrocom uses a disciplined, strict business case focus to determine whether to deploy network infrastructure. Our company deploys its own switches and uses unbundled loops and T-1s. In addition, we deploy fiber over-builds on a limited, business case-justified basis.
Regulatory Resources:	To date, our company's limited regulatory resources largely have been focused on important operational issues at the state level, including interconnection negotiations, unbundled element pricing dockets, proceedings to ensure adequate access to ILEC OSS, and complaint and enforcement activities.
RBOC Relationships:	TDS Metrocom has interconnection agreements with SBC-Ameritech, and exchanges traffic with SBC-Ameritech in 3 states.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

AFFIDAVIT OF NICHOLAS D. JACKSON

I, Nicholas D. Jackson, pursuant to 28 U.S.C. Sec. 1746 do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed as Vice President - Business Operations by TDS Metrocom, Inc.
2. My business address is 525 Junction Road, Suite 6000, Madison, WI 53717-2105.
3. TDS Metrocom is a competitive local exchange carrier currently providing service in Illinois, Michigan and Wisconsin. TDS Metrocom is a wholly-owned subsidiary of TDS Telecom. TDS Telecom also owns and operates 106 rural, incumbent local exchange carriers in 28 states. TDS Telecom is itself a wholly owned subsidiary of Telephone & Data Systems, a publicly-owned holding company that trades on the American Stock Exchange under the symbol TDS.
4. The purpose of this Affidavit is to provide information relevant to the FCC's proceeding reviewing ILEC unbundling obligations. The statements below will provide evidence showing that it is imperative that TDS Metrocom continues to

have access to UNEs, that alternatives to ILEC provisioning of these elements are minimal in some areas and completely nonexistent in most others, that TDS Metrocom would be seriously impaired in its ability to provide service without critical UNEs, such as loops (including conditioned loops, sub-loops and high capacity loops), interoffice transport and OSS. Further, restricting unbundling requirements based on whether or not the facilities can be used for broadband services would undermine TDS Metrocom's access to the customer and stifle innovation in new products and services.

5. TDS Metrocom serves both residential and business customers in mostly small to medium-sized markets with 10,000-100,000 residents. TDS Metrocom offers customers a full range of products including local and long distance voice, dial-up Internet access, custom calling features, voice mail, DSL and other data products, among other things. Through the use of innovative pricing and bundling of products and services TDS Metrocom has grown to over 160,000 lines, of which nearly one half (75,000) belong to residential voice and DSL customers.
6. TDS Metrocom uses a mix of its own facilities and UNEs to provide service in its chosen markets and does not use resale or UNE-P provisioning methods. Self-provisioned facilities include 7 Class 5 Siemens EWSD switches, over 100 collocation sites with DSL capability, fiber transport and/or SONET rings in selected markets and limited facilities built directly into customer premises.
7. TDS Metrocom is fully funded through internal sources by its corporate parent, Telephone & Data Systems. While such internal funding has provided insulation from excessive market volatility, the company's internal investors are no less

demanding than outside investors. With cellular, ILEC, CLEC and international holdings (and previously paging and PCS holdings), the management of Telephone & Data Systems has numerous alternatives for its capital investment funds. Accordingly, with every request for funding to enter a new market or expand facilities, TDS Metrocom must develop rigorous 10-year financial plans that provide a clear blueprint for future profitability. Based on these approved business plans, TDS Metrocom has already invested over \$200 million in facilities with each and every foray being cost-justified.

8. The result of the careful planning process described above has been very targeted investment and overbuilding of the ILEC network only in cases where it was economically rational to do so. For example, many of the locations where TDS Metrocom has facilities directly into a customer premise are buildings owned or leased by company affiliates - TDS Metrocom, TDS Telecom, US Cellular and Telephone & Data Systems corporate headquarters, call centers, data centers and other buildings. The investment in these facilities could be justified because stable long-term customers with known revenue streams were located at the site. Similarly, in areas where there is a large customer base, building interoffice transport facilities to link various ILEC central offices with TDS Metrocom's switches can be cost-justified once traffic levels become high enough.
9. Because of limited resources for investment, but with the desire to serve any and all customers in each market entered, there is obviously a need to find alternative sources to reach customer premises and to link collocation sites to the TDS Metrocom switch. Extensive research has been done to identify all potential

sources for these facilities. Unfortunately, the results of ongoing research continue to be the same - while options exist over a few selected transport routes and to a very small number of buildings, the only carrier with anything even close to ubiquitous coverage is the ILEC. Wireless local loop alternatives are too costly, are not available in TDS Metrocom markets and do not provide a platform robust enough for the products and services TDS Metrocom offers. Similarly lacking are fiber wholesale markets especially in smaller communities where the only alternative fiber in place is likely to be long haul transport facilities usable only for interexchange traffic.

10. Access to ILEC facilities as UNEs is therefore critical to the success of TDS Metrocom. In particular, access to the local loop, conditioned loops, sub-loops and high capacity loops is vital. For residential and small business customers who are served off of basic loops or sub-loops, there is absolutely no way to justify overbuilding ILEC facilities using current technology, be it wireline, wireless or satellite. Even for the largest business customers who use high capacity loops, overbuilding is inefficient except in very limited circumstances. When looking at TDS Metrocom's largest business customers based on revenue, and therefore those cases where investment in facilities could potentially be recouped, as of mid-2001 building facilities to only 86 out of 1356 large business customers, around 6%, could be cost justified. Couple that with the fact stated above that many of TDS Metrocom's largest business customers are company affiliates, and one can see that self-provisioning accounts for a minimal amount of necessary loop facilities. Additionally, because of the lack of adequate third-party

alternatives to the ILEC network in TDS Metrocom's markets, not a single loop to an end user has been provisioned through a third party vendor. ILEC loops continue to be the only available link to the vast majority of current and prospective customers.

11. With respect to a second important element, interoffice transport, the state of the market is similar, especially in the tier 2 and 3 markets where TDS Metrocom operates. In order to justify building redundant facilities to connect TDS Metrocom switches to collocation sites in ILEC central offices, there needs to be a very large customer base with a high level of traffic to cover the cost of deployment. TDS Metrocom has found that it can cost up to \$20-\$30 per foot and up to \$150,000 per mile to lay fiber. Added to that is the cost of obtaining franchise or right of way agreements which can be as high as \$10,000 and ongoing right of way use fees that in some cases have been as high as \$0.20-\$0.30 per foot, per year. This presents a significant hurdle that must be overcome to recoup investment in facilities. Since the ILEC is unlikely to encounter the same costs and time delays with deployment, the only economically prudent course is to use ILEC transport UNEs.
12. The Commission must understand that market forces and policy decisions severely constrain carriers who wish to build facilities from recovering the costs of those facilities. CLEC retail rates are effectively capped near the ILEC rate for obvious competitive reasons. Consider also that for much of TDS Metrocom's target market, residential customers, those rates have been suppressed over time for policy reasons, thus limiting recovery of investment costs even further. On

the wholesale side, regulators have curtailed recovery of costs by limiting CLEC access rates and raising the specter of full bill-and-keep compensation under the misguided impression that CLEC cost structures are identical to those of giant 100-year old monopolies. If CLECs cannot adequately recover the massive cost of building out a redundant network from their retail customers or their wholesale customers, what must be done? The only rational thing to do is to target investment in facilities where practical and to access the ILEC network through UNEs at all other times because its huge economies of scale and other efficiencies reduce costs for everyone on the network.

13. Even with the many challenges facing CLECs, especially those who seek to serve residential customers, TDS Metrocom's business plan is proving successful. Giving customers a choice of providers who offer a full suite of voice and data services has resulted in numerous customer benefits in the way of innovative pricing and bundling packages and the deployment of advanced services. However, this will only continue if TDS Metrocom is able to obtain the UNEs it needs and offer any and all services over those facilities. If regulators were to restrict access to portions of the ILEC network or limit the type of services CLECs can provide over UNEs, gaining new customers will be difficult if not impossible.
14. Proposals to exempt broadband or newly-deployed networks from UNE requirements ignore the fact that a single network is used to provide all of these services by the ILEC. Data and voice run over the same facilities and will continue to do so although the mix of such services may change over time. A

system where ILECs are able to use facilities for whatever purpose they want yet CLECs can only provide limited services or not even access certain portions of the network would be inherently discriminatory and would be a detriment to customers. Any restrictions based on a snapshot of technology and services today could suppress the development of creative new uses for the network that may not be envisioned at this point in time. Simply put, TDS Metrocom's experience shows that open networks promote innovation and competition.

15. If these restrictions had been in place previously, many customers in TDS Metrocom's markets would have missed out on numerous new product and service bundles and it is likely that many would not have access to DSL. TDS Metrocom was the first carrier to provide DSL to residential customers in most of its markets in Wisconsin and Illinois. The ILEC did not begin to provision DSL until after TDS Metrocom had shown success in the market, even though cable modems had been in place in some areas prior to TDS Metrocom DSL entry. In fact, there remain some customers whose only DSL option is TDS Metrocom, not the ILEC. Similarly, in some areas TDS Metrocom provides DSL in competition with the ILEC where cable modems have yet to enter the market. UNE restrictions on facilities or services would clearly have slowed the roll out of broadband to customers, mostly residential customers, in many TDS Metrocom markets.
16. Examples also exist where the ILEC has used its position as the monopoly provider of loop facilities (and in the case below, broadband services) to limit choice in voice services. In a few geographic locations where TDS Metrocom

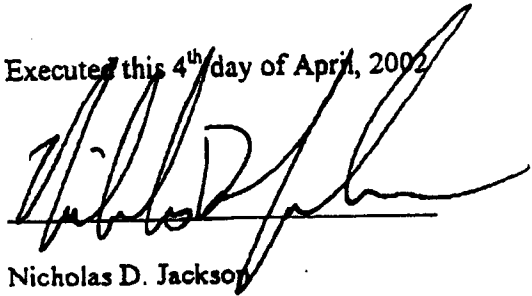
provides voice but not DSL service (because access to remote terminals has been difficult to obtain or impossible to cost-justify), the ILEC has used this situation as a means to lock in business customers. In cases where business customers have voice and DSL service from the ILEC, the DSL service is many times placed on the customer's first/main line. This line is usually the number where hunt groups are targeted and is the main billing number. As such, in order for TDS Metrocom to provide voice service to the customer it must have this first line. However, there are numerous examples where the ILEC has refused requests from their own customers to move the DSL line to another copper pair. This leaves the customer with the choice of either keeping the ILEC voice service in order to keep its data connection running or disconnecting its DSL (and incurring early termination penalties) in order to take TDS Metrocom voice service. A disconnection of DSL also forces customers to wait weeks or months to get a newly installed DSL connection from the ILEC and to pay additional installation charges.

17. The result of Commission action to reduce the current list of UNEs or place restrictions on how facilities can be used would be a detriment to customers everywhere. TDS Metrocom entry into the market has proven that competition spurs innovation through its deployment of facilities and services. TDS Metrocom market entry forces the ILEC to respond with changes to its product offerings and acceleration of its technology deployment. As TDS Metrocom deployed DSL and service bundles with features like unlimited local calling, the ILEC responded in kind by investing more in facilities and promoting relatively

hidden service bundles. TDS Metrocom is now responding in some areas by altering its own product offerings to be more competitive. This cycle of innovation was the goal of the 1996 Telecom Act and is occurring, albeit on too limited a scale. However, only with adequate access to UNEs has this occurred and will it continue to occur and expand in the future.

18. This concludes my Affidavit.

Executed this 4th day of April, 2002

A handwritten signature in black ink, appearing to read "Nicholas D. Jackson", is written over a horizontal line. The signature is stylized with a large, sweeping initial "N".

Nicholas D. Jackson

NUVOX INC.

NUVOX INC. ("NuVox") is a rapidly growing, facilities based integrated communications provider. NuVox emerged from the union of two regional CLECs, Gabriel and TriVergent. Using its own digital and packet switching equipment, collocated transmission equipment in more than 205 collocations, as well as limited fiber over-builds, NuVox serves 30 predominantly tier-two and tier-three markets in 13 states across the midwest and southeast.

Characteristic	Description
Funding:	NuVox, a privately held company, has raised \$550 million of equity capital for its operations, and entered 2002 with \$47 million of cash, \$163.9 million of senior debt, and \$63.8 million of undrawn financing under its senior debt facility, providing total available capital of \$110.8 million and a net debt-to-invested equity ratio of 21.25%.
Market Segment:	NuVox provides integrated local, long distance, Internet and broadband data communications services to small and medium-sized business customers in 30 predominantly tier-two and tier-three markets. At the present time, NuVox serves approximately 13,000 on-net business customers, and approximately 160,000 total access lines.
Geographic Focus:	NuVox serves 30 markets, in 13 states across the midwest and the southeast.
Product Focus:	NuVox packages dedicated high-speed Internet access, web design and hosting, and "traditional" local and long distance telephone services with unified voice, e-mail, and fax messaging, as well as advanced data services. In addition, NuVox provides dial-up Internet services, data center services, and Customer Premise Equipment interconnects.
Growth:	NuVox entered 2002 with annualized revenues of \$108 million (a 130% year-to-year increase), total available capital of more than \$110 million, total assets of \$568 million, and 29 of its 30 markets reporting positive gross margins. Annualized core broadband revenues, including those revenues from bundled local, long distance, Internet and broadband data services, increased 249% from \$25.7 million and 55% of total revenues in December 2000 to \$89.8 million and 84% of total revenues in December 2001. Moreover, 2001 revenues for NuVox totaled \$83 million, a 487% increase over its 2000 revenues of \$14.1 million. In 2001, revenues attributable to core broadband bundle products grew 472%, to \$61.2 million during 2001 from \$10.7 million during 2000. Gross margins for the year 2001 were 22%, versus 16% for the year 2000. During 2001, on-net access lines in service increased 294%, from 34,629 lines on December 31, 2000 to 136,456 lines at the end of 2001.
Provisioning Method/Facilities:	NuVox provides its "broadband bundle" of services using its own digital and packet switching equipment, and collocated transmission equipment in 205 collocations. NuVox provides broadband data services to most of its customers over an integrated T1.

Regulatory Resources: Our limited regulatory resources are focused on interconnection agreement procurement and dispute resolution, state proceedings, customer care, federal regulatory and state and federal legislative activities.

RBOC Relationships: We have interconnection agreements with SBC-Southwestern Bell, SBC-Ameritech, Cincinnati Bell, Verizon and BellSouth.

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Advanced Telecommunications Capability)	
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**AFFIDAVIT OF EDWARD J. CADIEUX
NUVOX, Inc.**

I, Edward J. Cadieux, pursuant to 28 U.S.C. Section 1746, do hereby declare, under penalty of Perjury, that the following is true and correct:

1. I am employed as Vice President of Regulatory and Public Affairs by NuVox, Inc. ("NuVox"). I have more than 20 years of regulatory, legal and public policy experience in the telecommunications industry.
2. My business address is 16090 Swingley Ridge Road, Suite 500, Chesterfield, Missouri 63017.
3. NuVox is a rapidly growing, facilities-based integrated communications and applications services provider, offering local voice and data services, domestic and international long distance services, dedicated high speed internet access, digital subscriber line access, unified voice, e-mail and fax messaging and other advanced services, including but not limited to local area and wide area network management, virtual private networks, website design, web page hosting, audio conferencing and a comprehensive set of web-based business applications. NuVox's marketing focus is to offer small and medium-

sized business customers a competitive alternative for all of their communications-related needs. NuVox provides service in 30 markets in 13 states throughout the Southeast and Midwest. A list of the markets served by NuVox is attached hereto as Schedule A.

4. The purpose of my Affidavit is to provide information relevant to the Commission's review of the unbundling obligations of Incumbent Local Exchange Carriers ("ILECs").
5. NuVox has constructed its networks using what is generally referred to as a "smart build", capital efficient approach. We have installed our own voice and data switching infrastructure, but lease the transmission elements of our networks from the serving incumbent local exchange carrier ("ILEC") or, where available, from other providers ("third party providers"). NuVox does not self-provision loop or transport facilities. Even under the smart build approach, NuVox is very much a facilities-based carrier, with 30 ATM data switches and 14 Class-5 digital voice switches installed, 205 collocations deployed and in service, and multi-service customer premises equipment supplied to many of our customers, supporting integrated voice and data service over leased DS1 loop facilities.
6. This network configuration allows NuVox to offer integrated voice and data services via broadband access to small and medium-sized business customers throughout the entire geographic extent of the city markets we have entered – i.e., we are not tied to the limits of a fiber-ring serving a small, concentrated business district, but can extend choice to business customers throughout a metropolitan area. However, this approach is premised on the availability of reasonably-priced loop and transport facilities from the serving ILEC or from third-party providers in each of our 30 markets.

7. As it has deployed its networks, NuVox has aggressively sought out third-party vendors in an effort to ensure that it obtains the best possible price for the leased facilities it requires to connect its customers to its switching platforms. Regarding loop facilities, NuVox's preferred approach is to utilize DS1 level circuits to provide integrated voice and data services. Most of our customers and lines are served in this manner. (For very small customers, we use leased 2-wire analog loops for voice service and DSL loops for internet access).
8. Regarding HiCap (*i.e.*, DS1 or higher level) loops, NuVox does not obtain these facilities from third-party providers in any of our markets. Our experience has been that third-party providers do not offer a viable source of HiCap loop facilities. To the extent third-party providers have deployed any HiCap loop facilities in our markets, these facilities generally are in the form of fiber-rings with limited geographic coverage (*i.e.*, connected to a limited number of multi-tenant buildings), which is not compatible with NuVox's approach of offering service on a ubiquitous basis throughout a metropolitan area. Moreover, even within their limited geographic coverage, the availability of facilities from third-party providers is speculative at best – *i.e.*, generally NuVox is not aware of third-party providers actively offering HiCap loop facilities on an unbundled, wholesale basis.
9. With respect to dedicated transport (*i.e.*, dedicated DS1 and DS3 facilities connecting from the customer's ILEC serving end office to NuVox's hub site or to another ILEC wire center), again consistent with its smart-build approach NuVox does not self-provision these facilities. Instead, NuVox leases either DS1 or DS3 circuits (depending on capacity requirements over specific routes) from the serving ILEC or from third-party

providers. With respect to DS1 dedicated transport, virtually all of the facilities NuVox obtains are from the serving ILEC. Generally, potential third-party providers of dedicated transport are facilities-based CLECs that have deployed collocations and their own dedicated transport facilities, and have made a business decision to offer portions of their transport capacity on an unbundled, wholesale basis. With respect to DS1 transport, NuVox's experience across its markets has been that where these third-party providers exist they either do not offer dedicated transport at the DS1 level (only at the DS3 level or higher) or that operational interfaces at the DS1 level are too problematic for third-party providers to be a viable facility source.

10. Even if third-party vendors would offer DS1 transport on an unbundled wholesale basis, those alternative vendors would only provide a partial alternative transport facility source because their own transport facilities are built to only a subset of ILEC serving wire centers, to other telecommunications carrier points of presence and to select, high density office buildings and campuses. They do not provide anything approaching the geographic ubiquitous coverage that NuVox requires to serve small and medium-sized business throughout a metropolitan area.
11. With respect to DS3 dedicated transport, the availability of third-party-provided DS3 facilities varies market-to-market. In some NuVox markets there is either no third-party provider of DS3 transport or only a single third-party provider and, as discussed above, within any particular market third-party providers collectively do not provide anything approaching the ubiquitous geographic coverage of dedicated transport that NuVox requires. In those markets where NuVox obtains capacity from ILEC OC rings to extend DS3s, third-party providers generally do not have the geographic coverage to offer a

competitively-priced alternative to the serving ILEC. Even in these circumstances, the serving ILEC's OC ring does not offer a source of DS3 connectivity to all of NuVox's serving area, since we are serving customers (via DS1 loop/dedicated transport combinations) on a ubiquitous basis, including substantial areas not covered by our collocations.

12. In some instances, ILEC special access is the only feasible alternative available to NuVox for DS3 transport – *i.e.*, where we obtain DS3 facilities carrying both UNE trunks and tariffed services, some ILECs (SWBT) will not permit "commingling" and will offer the DS3 carrying tariffed services only under the access tariff.
13. DS1s obtained from ILECs as special access circuits are not competitively priced. These facilities are not priced based on TELRIC and therefore do not reflect the costs of an efficient provider of transport facilities. NuVox's experience has been that ILEC DS1 transport facilities generally cost as much as 2 to 4 times the level of the same DS1 transport facility when provided as a UNE (e.g., typically Ameritech DS1 UNE transport is approximately \$200 per month, whereas the same DS1 transport facility obtained under its special access tariff may cost anywhere from approximately \$400 to \$800 per month.) DS1 transport obtained through ILEC special access tariffs inflate a CLEC's cost of doing business to a point which is unprofitable, making it essential that ILECs come immediately into compliance with the law and perform special access to EEL conversions in a timely and efficient manner.
14. In many other instances, NuVox cannot obtain dedicated transport from the serving ILEC directly as UNEs. This is particularly true regarding DS1 dedicated transport, but also includes some DS3 transport facilities (*i.e.*, some DS3s connecting to ILEC central

offices where NuVox does not have collocation) For these dedicated transport facilities NuVox must first lease these facilities as special access and then convert to UNEs under the Commission's special access to EEL conversion rules. DS1 and DS3 dedicated transport obtained as special access are priced excessively and, while a short-run necessity for NuVox where direct EELs are not available, do not offer a sustainable, economically-viable basis for providing integrated voice and data services. The availability of ILEC-combined DS1 loop/DS1 or DS3 dedicated transport facilities directly as UNEs – as opposed to only through a conversion of special access facilities – varies among ILECs and, in some instances, within an ILEC's region between states or even between portions of markets. In NuVox's seven markets in the SWBT region, in most instances we are able to obtain dedicated transport directly as UNEs as part of a DS1 loop/dedicated transport combination – i.e., the Enhanced Extended Link (“EEL”). SWBT has made these facility combinations available as UNEs as result of either state arbitration decisions or as a product of its “2A” interconnection agreements filed in conjunction with their Section 271 applications.

15. However, in a number of NuVox's other markets the serving ILECs (Ameritech, BellSouth, Cincinnati Bell and Verizon) do not voluntarily offer DS1 loop/dedicated transport as UNEs directly, but instead require these facilities first be deployed and billed as special access circuits and then converted to UNE pricing as EELs. As a result, many of NuVox's DS1 dedicated transport facilities (and some DS3 transport) in markets served by these ILECs are initially ordered and billed pursuant to the ILECs special access tariffs. In reviewing the ILECs' unbundling obligations, NuVox urges the Commission to take into account the extent to which some of these very same ILECs

have failed to implement the Commission's directives regarding special access to EEL conversions in a timely and efficient manner. NuVox has encountered difficulties with the ILECs in getting these conversions accomplished. NuVox's experience has been that the ILECs it has dealt with on special access to EEL conversions were either initially unprepared to process the conversions and/or created artificial barriers to conversion of these facilities to UNEs. For example, Ameritech did not have the internal order processing systems and procedures in place to handle special access to EEL conversions when NuVox began the process in first quarter, 2001. Shortly thereafter, in three separate incidents, Ameritech inadvertently disconnected service to a total of 50 NuVox Ohio customers when Ameritech attempted to process the conversion of orders. In September, 2001, Ameritech caused a fourth outage incident. NuVox found that BellSouth, Cincinnati Bell and Verizon were likewise initially unprepared last year to promptly process special access to EEL conversions. BellSouth created other barriers to special access to EEL conversions – *e.g.*, it raised the specter of threatening to seek recovery of "leaky PBX surcharges" from CLECs as a consequence of their submission of conversion requests. Ultimately, BellSouth backed away from that position. Nevertheless, this is an indication of the type of roadblocks CLECs have faced in attempting to convert these facilities to UNE pricing.

16. Retention of the mandatory unbundling requirements for HiCap loops and transport will promote the continued growth of both voice and broadband competition. NuVox and an increasing number of CLECs are combining ILEC HiCap Loop and dedicated transport facilities to provide bundled voice and broadband data services. See March 12, 2002 Yankee Group Research Notes, attached hereto as Schedule B (describing the bundled

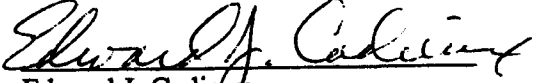
voice and data over T-1 facilities by Allegiance Telecom, XO Communications, ITC DeltaCom and NuVox). Combining voice and data over HiCap facilities creates an efficient use of network facilities and facilitates competitive pricing and convenience for the customer. Combining voice and data over leased ILEC HiCap facilities provides a method for bringing broadband service to market segments and to geographic locations that otherwise have limited or no broadband supplier alternatives. Bundled voice and data via leased ILEC HiCap facilities allows NuVox to drive the offering of voice and broadband data services down market – to small and medium-sized business customers, a market segment historically underserved by the ILECs. This serving strategy also permits NuVox to offer service broadly throughout the markets it serves – i.e., by leasing HiCap facilities from the ILEC we are not limited to offering service along a fiber ring route or constrained by the boundaries of a cable network.

17. In order to promote the expansion of broadband services, the Commission must require that ILEC HiCap loop and transport facilities remain available as UNEs. HiCap facilities under ILEC special access tariffs are priced excessively and therefore provide no substitute for UNEs. Because UNEs are priced based on TELRIC, those prices reflect the costs of an efficient supplier. In contrast, ILEC special access tariff rates for the same HiCap facilities can be several times the comparable UNE price.

VERIFICATION

State of Missouri)
) SS
County of St. Louis)

Edward J. Cadieux being duly sworn states that he is the Vice President, Regulatory and Public Affairs of NuVox, Inc., and that the facts set forth above are true and correct to the best of his knowledge and belief.


Edward J. Cadieux

Subscribed and sworn to before me, this 4th day of April, 2001.



My commission expires:

ELLEN RUBIN
Notary Public - State of Missouri
County of St. Louis
My Commission Expires Mar. 20, 2005

ATTACHMENT 2



Joan Marsh
Director
Federal Government Affairs

Suite 1000
1120 20th Street NW
Washington DC 20036
202 457 3120
FAX 202 457 3110

January 14, 2003

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Written Ex Parte Communication, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147
*** Public Version ***

Dear Ms. Dortch:

SBC has claimed that because AT&T self-provides a significant proportion of its own DS3 "tails" that connect to its local backbone rings, that fact alone warrants broad-scale de-listing of virtually all high capacity loops as unbundled network elements. SBC's superficial analysis must be rejected, because it ignores the other market realities that AT&T and others have provided on the record, including the following:

(1) ***The Referenced DS3 Tail Circuits Are A Small Fraction of the Relevant Universe*** - The DS3 "tails" identified by AT&T relate to a small base of facilities that covers only the narrow situations in which the combined demand for local voice, local data and access services from a specific location warrants consideration of whether to build fiber-based facilities capable of supporting DS3 (or higher capacity) services, *i.e.* a total demand of about 3 DS3s.¹ The total universe of DS3 tails is relatively small (about 16,000); and AT&T has itself self-deployed slightly more than half of those facilities, spread across more than 60 metro markets. This evidence is fully consistent with AT&T's demonstrations in this record that where ever and whenever a facilities build is economically justified, AT&T will deploy its own facilities.

Critically, the number of DS3 tail *circuits* sold does *not* equate to the number of physical *facilities* built to customer premises. As AT&T has previously shown, when a

¹ *Ex parte* letter from Joan Marsh dated November 25, 2002 ("Marsh *ex parte*"), Attachment B.

CLEC is considering whether to build “tail” facilities *from its local backbone ring* to a customer’s premises, it will generally require almost 3 DS3s worth of total demand to justify the construction, where the other conditions required to justify a build (*e.g.*, prompt, cost-based access to necessary rights-of-way and buildings, reasonable proximity of the customer location to the backbone facility) are satisfied.² And even though a customer may require about 3 DS3 tail circuits, the entire service is provided over a *single fiber*. Accordingly, the number of tail *circuits* that AT&T reported represents about *three times* the number of *buildings* that are actually connected to AT&T’s network. This is fully consistent with AT&T’s evidence that it has only been successful in placing about 6,000 locations “on-net” across the entire country where such DS3 tails are sold to the customer. Those AT&T on-net buildings represent about 10% of the 50,000 to 60,000 locations that theoretically could justify building new high capacity loop facilities. Thus, AT&T has *not* been able to reach *about 90%* of those “target” buildings using entirely its own (or competitive) facilities. And as AT&T has also shown, because of restrictions imposed by landlords, AT&T is not even entitled to use its own facilities to serve all of the customers in the vast majority of the buildings it has actually reached with its own DS3 “tails”.³ Thus, it still needs to access to unbundled high capacity loops to serve other customers in buildings that are already connected to its own network. Indeed, AT&T’s experience also shows that ILEC facilities must also be used to serve customers in a very substantial portion of the buildings where AT&T has built its own loop facilities (*i.e.*, has the building on-net).⁴

(2) ***The Minimal Evidence Relating to the Ability to Self-Provision DS3 Tails Is Irrelevant To Lower Capacity Circuits*** - Virtually the entirety of AT&T’s more than one million tail circuits *below* the DS3 level are ILEC provided. Ninety one percent of its DS0 tails and eighty six percent of its DS1 tails are provisioned by ILECs. AT&T’s experience is not dissimilar to that of other CLECs that have reported comparable data. Thus, there is no evidence at all that any competitor could self-provision DS1 (or lower capacity) tails, because such locations do not even approach the level of total demand necessary to consider self-provisioning, and for the loops delivering DS1 and lower capacities, the CLEC impairment is extreme.

(3) ***A CLEC’s Ability to Self-Provision Loops Cannot Be Assessed in a Vacuum*** - Self-provisioned loops are almost always provisioned as *extensions* to otherwise justified metropolitan transport facilities that are self-provided. Said another way, transport rings are built first and then, where justified, loops are extended to buildings, or building rings are attached to the transport ring. The converse is not true. Thus, a CLEC

² *Id.* “Tail” circuits only run between a CLEC’s metro fiber ring and a customer premises. As discussed below, a CLEC would virtually never consider building a loop from a customer location to any other location. Thus, tail circuits do not include any “traditional” loops that connect customer premises to ILEC central offices.

³ *See, e.g.*, AT&T Comments at 146, Leshner-Frontera Declaration, ¶ 42; AT&T Reply Comments at 176.

⁴ Leshner-Frontera Declaration ¶ 42.

will *not* consider self-providing DS3 loops⁵ unless local conditions have also supported the construction of its own local transport facilities. And as AT&T has showed, a CLEC cannot economically justify the construction of a metro fiber transport ring unless it is able to provide about 18 DS3s of traffic at each node on the ring.⁶ Thus, economic loop construction is intimately related to the existence of sufficient demand for transport in an area. And critically, commingling and use restrictions, which limit CLECs' ability to aggregate demand at hubs, not only reduce competitive local fiber ring deployment but also deter competitors' ability to construct loops.

(4) ***The Market for Deployment of Competitive High-Capacity Facilities is Mature*** – A competitor's opportunity to address buildings with non-ILEC high capacity facilities is also limited, because the market for deploying such facilities is mature. Much of the competitive build-out of alternatives to the ILECs' high capacity facilities occurred even before passage of the 1996 Act. Furthermore, as acknowledged by the Commission, the ILECs have extensive local fiber deployment and, when the fiber was deployed, substantial unused capacity was also installed. Thus, the number of instances in which there is an overlap between previously unaddressed high demand locations and positive conditions for building (building access, proximate transport ring capacity, practical rights of way access, etc.) is now relatively small. Indeed, even in New York, one of the most densely penetrated markets for competitive facilities, the New York PSC found that in LATA 132, which includes New York City, Verizon served *over seven times* the number of buildings using fiber facilities as all competitors combined.⁷ Thus, even after more than a decade of attempted competitive construction, it is clear that the ILECs have a large majority share of the high capacity facilities used to serve the prime "big" buildings, and a virtual monopoly with respect to access to the almost 3 million other commercial buildings that are not addressable through a competitive facilities build.

(5) ***Failure to Permit Competitive Access to High Capacity Facilities as UNEs Risks ILEC Remonopolization*** - Given the pervasive 271 authority that has been granted since the *UNE Remand Order* was issued, together with the recent aggressive RBOC efforts to de-regulate broadband services, elimination of competitive access to high capacity facilities as UNEs will likely result in the RBOCs' monopolization of the data services provided to medium- to large-sized business locations. Absent unbundling of high-capacity loops and transport, the incumbents will have the means and the incentive to apply "market-based" pricing that provides their competitors with only two options: (a) not

⁵ CLECs would never consider constructing their own DS1 or lower capacity loops. See AT&T Reply Comments at 159 (explaining that DS1 loops are typically provided using the same physical plant as ordinary copper loops).

⁶ Marsh *ex parte*, Attachment A.

⁷ Case 00-C-2051, *Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc.*, issued June 15, 2001 at 7 (also finding that Verizon has over 8,000 miles of fiber facilities in that LATA "compared to a few hundred for most competing carriers"); see also New York State Department of Public Service Comments at 5 (opposing elimination of high capacity loops as UNEs and stating that "[e]ven in lower/midtown Manhattan, Verizon facilities (wholesale and retail) serve over half of all special access service circuits" and that "in upstate New York, Verizon facilities serve almost 90% of such circuits").

serving the customer because they cannot self-supply tail circuits and transport at competitive cost levels; or (b) paying excessive and non-cost-based prices for loops/transport that transfer virtually all the profitability of the entire service to the ILEC. In addition, without the ability to serve high volume locations, potential competitors will lack the ability to build scale and generate free cash that permits them to extend their facilities to serve down-market segments.

(6) ***AT&T's Data are Consistent*** - Finally, AT&T's data relating to the availability of alternatively provided tail circuits reinforce the fact that almost 3 DS3s of demand are required to "prove-in" a decision to build a loop in cases where the backbone facility exists to connect with a customer location, assuming that the other conditions required to justify a build are satisfied. AT&T's earlier *ex parte* demonstrated that, on average, a building would not prove attractive for a loop build -- assuming that a transport ring already existed -- unless there were at least 77 DS1 equivalents of service required. Converting the latter figure to DS3 equivalents (*i.e.*, dividing by 28) shows that 2.75 equivalent DS3s are required.⁸ As corroboration of this figure, AT&T examined the services sold to on-net locations. *** Proprietary information *** Dividing total DS3 services sold to on-net locations by the number of active buildings on AT&T's metro ring, the numbers demonstrate that, on average, AT&T actually delivered between 2.62 and 2.88 DS3 equivalent tails per "on-net" building. The data supporting this calculation will be provided in a separate proprietary *ex parte*.

In sum, the question of impairment with respect to high capacity loops is two-pronged: (1) Does the requesting carrier have the practical opportunity to serve at least 3 DS3s worth of equivalent demand at the identified location, and (2) Can the carrier practically and economically connect the location to its existing local transport network using its facilities? Unless the answers to both questions are "yes," there is no reason to believe that the requesting carrier will be able to profitably provide facility-based retail services using its own high capacity loops. Thus, the mere fact the AT&T may have been successful in addressing *some* buildings with "on-net" DS3 tail circuits does not demonstrate that AT&T -- or any other carrier -- can deploy its own facilities to serve *other* customers in *other* locations.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joan Marsh', with a long horizontal line extending to the right.

Joan Marsh

cc: Thomas Navin
Jeremy Miller

⁸ Marsh *ex parte*, Attachment B.

PUBLIC VERSION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

**AFFIDAVIT OF MICHAEL P. DUKE
KMC TELECOM, INC.**

I, Michael P. Duke, pursuant to 28 U.S.C. Section 1746, do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed by KMC Telecom, Inc. ("KMC") as Director of Governmental Affairs.
2. My business address is 1755 North Brown Road, Lawrenceville, GA 30043.
3. KMC is a facilities-based integrated communications provider offering a full range of advanced voice, data, and Internet infrastructure services in 35 markets across the eastern half of the United States. Since its start in 1995, KMC's business plan has been to serve business customers in Tier III markets (ranging between 100,000 and 750,000 in population) with a full array of telecommunications services over our own facilities. These facilities include a Lucent 5ESS switch and a robust advanced fiber-optic SONET backbone ring. KMC's business plan calls for a network design and deployment sufficient to reach approximately 80% of the commercial buildings in each local market through either direct fiber connections ("on-net") into customer locations, or through the lease of unbundled network elements ("UNEs") from the incumbent local exchange carrier ("ILEC") (an "off-net" arrangement). This 80% figure represents in the aggregate approximately 97,000 buildings eligible for on-net service, plus 168,000 buildings that are available only via a UNE architecture, totaling 265,000 buildings. To obtain such market coverage, KMC has made a significant investment in a local SONET network and has typically collocated at three ILEC offices in each market: the local tandem office and two end offices.
4. KMC, like many competitive local exchange carriers, has had to dramatically reduce its capital expenditure ("capex") budget for new network build projects. Our 2001 budget

PUBLIC VERSION

was **BEGIN PROPRIETARY** **END PROPRIETARY** less than our 2000 capex budget. Our 2002 capex is even further reduced by **BEGIN PROPRIETARY** **END PROPRIETARY** from last year's budget.

5. The purpose of my Affidavit is twofold. First, I will show that KMC, despite having made excellent progress in developing a redundant local network, still must have access to ILEC unbundled loops in order to deploy the services it wishes to provide. Secondly, I will explain why KMC could not act as a third-party vendor to other CLECs for the provision of local network elements.
1. **KMC MUST CONTINUE TO OBTAIN LOOPS, INCLUDING HIGH-CAPACITY LOOPS, FROM ILECs ON AN UNBUNDLED BASIS**
6. KMC has deployed over 2,100 route miles of fiber, for an average of 60 miles of fiber in each of its markets. In deploying this fiber, KMC has focused its efforts to pass as many business locations as possible, using Dun and Bradstreet geo-coded market data. In each of our markets, KMC's fiber passes within 1200 feet of nearly 97,000 business locations. Yet KMC has only been able to self-provision fiber into **BEGIN PROPRIETARY** **END PROPRIETARY** buildings. This figure represents only **BEGIN PROPRIETARY** **END PROPRIETARY** of the market in these areas.
7. The process of self-provisioning loops is extremely expensive and time-consuming. In order to build loops to its customers, KMC must apply and pay for the required rights-of-way and permits. Once it receives approval, it must plan out how physically to install the loops, which generally requires actually digging up city streets.
8. We have calculated that the cost of self-provisioning high-capacity loops to a building is **BEGIN PROPRIETARY** **END PROPRIETARY** per building. This figure assumes a distance of 800 to 1200 feet from the KMC backbone to the building. It includes **BEGIN PROPRIETARY** **END PROPRIETARY** for engineering fees, **BEGIN PROPRIETARY** **END PROPRIETARY** for the fiber itself, **BEGIN PROPRIETARY** **END PROPRIETARY** for labor and **BEGIN PROPRIETARY** **END PROPRIETARY** to purchase the necessary electronics.
9. The tremendous expense of this process is difficult to justify financially, as KMC must recover its cost through extremely competitive rates and a small customer base, relative to ILEC volumes. We therefore have self-provisioned loops only in **BEGIN PROPRIETARY** **END PROPRIETARY** instances until our customer base can support additional expenditures.
10. Thus, KMC has had to collocate in 132 ILEC central offices for the purpose of obtaining unbundled loops to serve its customers. Specifically, KMC requires high-capacity loops – loops at the DS-1 level or higher – in order provide its integrated voice and advanced services. KMC presently provides service to **BEGIN PROPRIETARY** **END PROPRIETARY** locations over ILEC loops, which is **BEGIN PROPRIETARY** **END PROPRIETARY** of all the buildings in its service areas.

PUBLIC VERSION

11. Without access to unbundled high-capacity loops, KMC would be forced to forego service in these **BEGIN PROPRIETARY END PROPRIETARY** locations. KMC has still not found any third party that can provide it with alternatives to ILEC loops to fit its proposed service plan. The loss of ILEC unbundled loops would thus severely impair KMC in seeking to provide competitive services to end users.

II. KMC IS NOT AN ALTERNATIVE SOURCE OF FACILITIES FOR OTHER CLECs

12. Although KMC has deployed a significant amount of fiber facilities in its markets, it is not able to act as a third-party supplier to other CLECs. In order to minimize its deployment costs, KMC operates its transport at a very high fill rate. The transport facilities that it has self-provisioned are thus nearly at capacity, which does not permit other CLECs to buy capacity on our lines.
13. Nor does KMC have the necessary back office systems to support a wholesale transport offering to other CLECs. We have not developed interfaces to connect with the systems of other CLECs. Rather, KMC back office systems are devoted to interfacing with the ILECs and tracking our own orders, installations, and repair and maintenance. We do not have the capital budget to create systems to support a wholesale operation, even if we had the capacity to provide to CLECs in the first instance.
14. Therefore, the Commission should not view KMC's impressive deployment as evidence of a viable alternative market for transport facilities. KMC has simply not reached a level where it is able to develop a wholesale UNE offering.

This concludes my affidavit.

Executed this 4th day of April, 2002.

Michael P. Duke

Michael P. Duke
KMC Telecom, Inc.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
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1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

**AFFIDAVIT OF JOSEPH POLITO
SNIp LiNK, INC.**

I, Joseph Polito, pursuant to 28 U.S.C. Section 1746, do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed by SNIp LiNK, Inc. ("SNIp LiNK") as Director, Telecommunications Products. I have held this position since January 2001.
2. My business address is 100-A Twinbridge Drive, Pennsauken, NJ 08110.
3. SNIp LiNK is a facilities-based CLEC serving small businesses and institutional end users in suburban southern New Jersey and southeastern Pennsylvania. SNIp LiNK provides its customers with a full suite of bundled voice and broadband services using its own switching equipment and leased ILEC transmission facilities, principally as transport unbundled network elements ("UNEs"). Recently, SNIp LiNK commenced deployment of its first fiber ring. SNIp LiNK has been especially successful in bringing broadband Internet access services to school districts throughout the greater Philadelphia metropolitan area.

Difficulties in Obtaining Rights-of-Way

4. In order to build their own transport or local loop structure, SNiP LiNK must obtain the required rights-of-way. SNiP LiNK has found that obtaining rights-of-way in New Jersey, its core market at this time, is a very difficult process that is skewed in Verizon's favor. According to information provided by the New Jersey Board of Public Utilities ("NJ BPU"), New Jersey has no formal rules to govern the manner in which pole attachments are placed. The NJ BPU states that the matters of how rights-of-way and pole attachments are managed are left to the utilities to manage as they wish. Verizon has blanket authority to use rights-of-way and pole attachments for building its local network without applying to the local municipalities for permission, without paying a fee, and without rules from the NJ BPU.
5. All other carriers, including SNiP LiNK, must apply for use of a right-of-way. In two municipalities, Merchantville and Pennsauken, New Jersey, SNiP LiNK's Contractor had to pay fees of approximately \$2,000 for each application.
6. In addition to the cost of applications, SNiP LiNK also incurs a substantial delay in obtaining approval for the requested rights-of-way. At this time, more than 80% of the applications filed by SNiP LiNK's Contractor are still pending. SNiP LiNK is unable to build facilities until those applications are reviewed and granted. And rarely does a municipality have codified review procedures that enable SNiP LiNK to monitor application status. Verizon simply does not experience these difficulties – it never has to apply in the first instance.
7. Finally, once SNiP LiNK obtains the requested rights-of-way, the construction process is equally rife with delay, and sometimes more so. Verizon's standard right-of-way license

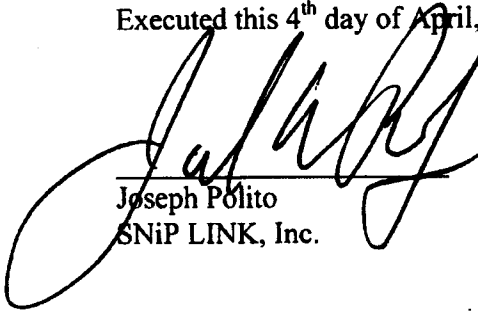
agreement contains very specific application, make-ready and construction timelines that all licensees must follow. These intervals add up to literally months before a licensee is actually able to construct facilities. Verizon, on the other hand, has complete control over its own construction, because it is the sole holder of the rights-of-way.

Alternatives to ILEC Unbundled Transport Are Not Available as a Practical Matter

8. SNiP LiNK must obtain transport facilities from ILECs, principally Verizon, in order to serve its customers. SNiP LiNK requires these facilities in order to carry bundled voice and broadband traffic. We have not been able to obtain the ubiquitous network build-out that we require in our markets without ILEC transport. For the reasons explained above, transport installation is made very difficult for us by the arcane rights-of-way process in many New Jersey municipalities. Third-party vendors face these same problems.
9. Verizon, by contrast, has full access to any right-of-way, and has been able to achieve crucial network ubiquity in transport facilities. As a result, alternatives to Verizon transport are not available as a practical or operational matter, requiring SNiP LiNK to continue to rely on unbundled transport facilities in building out its network. Were SNiP LiNK now unable to obtain transport as a UNE, it would be severely impaired in providing its chosen services to end users.

This concludes my affidavit.

Executed this 4th day of April, 2002.



Joseph Polito
SNiP LINK, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME this 4th day of April, 2002.



NOTARY PUBLIC

My Commission Expires:

JOEL STAIMAN
My Commission Expires Dec 26, 2005
State of New Jersey

ATTACHMENT 3

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January 28, 2003

VIA ELECTRONIC FILING

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: UNE Triennial Review, Docket WC 01-338: Necessity of Unbundled
Dark Fiber Loops

Dear Chairman Powell:

Dominion Telecom, Inc. ("Dominion"), by its attorneys, submits this *ex parte* letter in the above-captioned *UNE Triennial Review* proceeding to urge the Commission to ensure that all requesting telecommunications carriers, including competitive local exchange carriers ("CLECs"), obtain efficient, nondiscriminatory access to unbundled dark fiber loops. Specifically, Dominion will demonstrate, as several other carriers have successfully done,¹ that dark fiber loops amply meet the statutory impairment standard under Section 251(d)(2), and therefore that the Commission should continue to include it on the list of mandatory unbundled network elements ("UNEs"). In addition, Dominion will discuss the lingering obstacles that incumbent LECs ("ILECs") are creating to hinder competing carriers' ability to obtain dark fiber loops, and will propose modest alterations to the Commission's rules to remove these obstacles, making dark fiber loops available in a commercially meaningful way.

¹ E.g., Joint Comments of NuVox, KMC, e.spire, TDS Metrocom, MFN, and SNIp LiNK, Docket No. 01-338, at 77-80 (filed Apr. 5, 2002) ("CLEC Coalition Comments"); Joint Reply Comments of NuVox, KMC, e.spire, TDS Metrocom, MFN, and SNIp LiNK, at 53-57 (filed July 17, 2002) ("CLEC Coalition Reply Comments"); *Ex Parte* Presentation of El Paso Networks, LLC and Conversant Communications, LLC, Docket Nos. 01-338 *et al.* (Nov. 26, 2002) ("El Paso *Ex Parte*"); Letter from Lawrence R. Freedman, Counsel for Norlight Telecommunications, Inc. to Marlene Dortch, Secretary, FCC, Docket Nos. 01-338 *et al.* (filed Dec. 20, 2002) ("Norlight *Ex Parte*").

Chairman Michael K. Powell
January 28, 2003
Page 2

BACKGROUND

Dominion is a facilities-based telecommunications carrier, incorporated in Virginia, that is certified in 16 states as both a CLEC and interexchange carrier ("IXC"). Founded in 1997, Dominion's initial market for entry was long-haul, private line, point-to-point optical bandwidth services, typically large capacity circuits used by other telecommunications carriers and information service providers. More recently, Dominion has supplemented its carrier product offerings with advanced services for business customers, supporting the provision of point-to-point broadband services to end-user customers with large telecommunications capacity requirements, such as commercial, governmental, and financial institutions in the trans-Atlantic region. Dominion has targeted a number of cities on its network for those services, including second- and third-tier cities in the Atlantic region. Dominion has to date invested over \$600 million in its network, amassing over 10,000 route miles (300,000 fiber miles) of facilities. We will continue to invest in facilities — our 2003 budget includes the addition of 6,000 route miles of fiber — as customer demand for interexchange and advanced services grows.

In order to provide existing and innovative new advanced services to customers, Dominion must have cost-effective access to "last mile" facilities to interconnect with its extensive backbone network. Dominion estimates that it may require over 1000 local connections during the near term, a large proportion of which will be reachable only over dark fiber. Thus, Dominion's planned buildout requires access to dark fiber loops from the ILECs at TELRIC rates. If these loops are removed from the UNE list, or are not provisioned in an efficient, nondiscriminatory manner at TELRIC rates, Dominion will not be able to fully utilize its network, and its entry into new markets could be severely curtailed. This result would deprive hundreds of potential business customers in Tier 2 and 3 cities, many of whom presently have no choice of service provider, from receiving Dominion's innovative, productivity-enhancing services.

DISCUSSION

Section 251(d)(2) of the Telecommunications Act of 1996 ("1996 Act") requires the Commission to determine "what network elements" should be made available by ILECs to requesting carriers pursuant to Section 251(c)(3). In making that determination, the Commission must consider whether denying a requesting carrier access to a particular network element would "impair" that carrier's ability to provide the services that it seeks to offer.² Under existing Commission rules, dark fiber loops have been deemed to meet this test and, therefore, they must be unbundled.³ The Commission initiated this proceeding based on its promise to engage in a three-year review of the UNE rules, and in doing so it will address issues raised by the D.C.

² See 47 U.S.C. § 251(d)(2) ("In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.").

³ 47 C.F.R. § 51.319(a)(1).

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January 28, 2003
Page 3

Circuit's remand of its UNE rules in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"). The *USTA* court instructed the Commission to establish an impairment standard that "point[s] to something a bit more concrete"⁴ than does its existing analysis, specifically with regard to the competitive need for a particular element. As many have shown, and Dominion itself demonstrates here, dark fiber is so crucial that it not only meets the current impairment standard, but will satisfy virtually any unbundling standard adopted in this proceeding.

Section 251(d)(2) Requires Unbundled Access to Dark Fiber

In 1998, the Commission unequivocally held that "unbundling dark fiber is essential for competition in the provision of advanced services."⁵ Reasoning that "unbundled loops, including fiber, allow competitive LECs to build out their networks gradually,"⁶ the Commission held that "access to the full capabilities of incumbent LECs' loop plant nationwide will further the goals of the Act."⁷ The Commission therefore ordered that dark fiber loops must be unbundled "nationwide."⁸

The Commission found that dark fiber loops must not be distinguished from "lit" loops for purposes of applying Section 252 impairment analysis. That is, the expense and delay of self-provisioning loops applies regardless of whether the corresponding ILEC loop facility is dark or lit.⁹ Although Dominion agrees that dark fiber loops should be categorized as one type of loop for purposes of Commission rules,¹⁰ it must emphasize that, for purposes of impairment analysis, dark fiber is a particular type of facility that is especially crucial for competitive entry in largely unserved or underserved areas.

Loops have been recognized even by Congress as a key facility for the creation of telecommunications competition.¹¹ The Commission has understood for years that the ILECs' local loop architecture cannot be replicated absent extraordinary time and expense. Accordingly, the Commission has repeatedly recognized that competitors cannot reasonably be expected to replicate local loops,¹² as such an effort "would be extremely difficult for competitive LECs ...

⁴ *USTA*, 290 F.3d at 425.

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 16 FCC Rcd. 3696, 3785 ¶ 196 (1998) ("*UNE Remand Order*").

⁶ *UNE Remand Order*, 15 FCC Rcd. at 3785 ¶ 197.

⁷ *Id.*, 15 FCC Rcd. at 3786 ¶ 200.

⁸ *Id.*, 15 FCC Rcd. at 3786 ¶ 200.

⁹ *See id.*, 15 FCC Rcd. at 3785 ¶ 196.

¹⁰ Dominion understands that the Commission is considering whether to impose use restrictions on local loops. Even were use restrictions lawful under the plain language of Section 251(c)(3), which Dominion does not concede, such use restrictions would not be appropriate for dark fiber loops because these facilities are not yet in use by the ILEC and therefore cannot be deemed to bypass existing local access arrangements.

¹¹ The House Conference Report to the 1996 Act states that "the term 'network element' was included to describe the facilities, such as local loops" that an ILEC "must provide for certain purposes under" Section 251. H. CONF. REP. NO. 104-458, 104th Cong., 2d Sess. at 116 (1996).

¹² *UNE Remand Order*, 15 FCC Rcd. at 3779 ¶ 183.

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January 28, 2003
Page 4

even to serve businesses in urban districts.”¹³ A full loop “overbuild” would “embroil the competitor in lengthy rights-of-way disputes, and would require the unnecessary digging up of streets.”¹⁴ Even if such a project were technically and politically feasible, it is “prohibitively expensive and time-consuming.”¹⁵ In a best-case scenario, the competitor would incur an enormous up-front capital expenditure and would incur delays potentially extending a year or more in reaching customers.

The problems identified by the Commission with respect to loop architecture are present in both the self-provisioning and the third-party vendor context, and, in Dominion’s experience, they persist to this day. As a practical matter, building loop plant continues to be, in most cases, prohibitively expensive and time consuming. Dominion’s deployment figures show that installing fiber loops costs \$20 per foot in Tier 3 and 4 cities, and well over \$100 per foot in Tier 1 cities such as New York. These figures do not include franchise and right-of-way fees, which cost a minimum of \$15,000 per year in Atlanta and \$200,000 per year in New York City.¹⁶ It remains unreasonable to expect a new entrant to invest large sums of capital (or for Wall Street to invest such sums) to build loop plant (ubiquitous or even quite limited) before the entrant has secured a substantial and secure customer base and revenue stream. Under these circumstances, no loop — dark or lit — can be substituted with self-provisioning “as a practical, economic, and operational matter,” which entails mandatory unbundling.¹⁷

Dark fiber loops are especially critical because they often are located in areas where few or no competitors presently serve customers. This fact is true of many of Dominion’s targeted customers. Indeed, the fact that these loops lie fallow is indication that the ILEC has not perceived significant demand for “last mile” transmission capacity. Thus, if the Commission were to relax or abolish dark fiber unbundling, it would guarantee that many largely unserved or under-served areas continue to be denied competitive telecommunications choices. And the higher productivity that the customers of Dominion and others would enjoy by virtue of competitive services will in all likelihood be lost. This result flatly contravenes the 1996 Act.¹⁸ Thus, dark fiber loops patently qualify under Section 251(d)(2) — even under the *USTA* court’s analysis — and must remain unbundled.

¹³ *UNE Remand Order*, 15 FCC Rcd. at 3780, ¶ 185.

¹⁴ *Id.*, 15 FCC Rcd. at 3781 ¶ 186. The right-of-way issue has proved a significant obstacle to competitive deployment, causing the Commission to devote its rulemaking authority to its resolution. See *Third Advanced Services Report*, ¶ 166 & n. 375.

¹⁵ *UNE Remand Order*, 15 FCC Rcd. at 3780 ¶ 183.

¹⁶ Dominion presently pays for franchises in 30 locations, but would require a great deal more if it were forced to build out last mile facilities to new customers.

¹⁷ *UNE Remand Order*, 15 FCC Rcd. at 3846 ¶ 333.

¹⁸ The legislative history of the 1996 Act emphasizes Congress’s goals of bringing more innovative, lower-cost telecommunications services to Americans through the introduction of competition: “Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.” H.R. REP. NO. 104-104, 104th Cong., 2d Sess. at 48 (1996).

Chairman Michael K. Powell
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As several members of Congress recently observed in their letter to yourself and fellow Commissioners, the outcome of the *UNE Triennial* proceeding will have a profound effect on the nation's consumers and small businesses.¹⁹ Were the Commission to, as these representatives put it, "unilaterally dismantle the open network provisions of the 1996 Act," that effect would be harmful and irreversible. This result would certainly occur if the Commission no longer requires the unbundling of dark fiber loops.

The Commission Should Clarify Rule 51.319(a)(1) to Ensure Efficient, Nondiscriminatory Access to Dark Fiber Loops

Despite the Commission's standing order that dark fiber loops must be unbundled for any requesting carriers at TELRIC rates, certain ILECs have maintained policies and practices that render them functionally unavailable. By manipulating the "definition" of dark fiber, feigning ignorance as to the capacity and location of facilities, and refusing to connect non-contiguous facilities, some ILECs have in fact blocked requesting carriers from leasing dark fiber loops. Dominion therefore suggests modest amendments to existing Rule 51.319(a)(1), the definition of loops, to forbid the continuation of such restrictive practices.

The Definition of Dark Fiber Must Include Loops Not Terminated on ILEC Equipment

The Commission's dark fiber unbundling requirement is based on the industry standard definition: dark fiber is "[u]nused fiber through which no light is transmitted, or installed fiber optic cable not carrying a signal."²⁰ In other words, any loop not presently used to serve a customer is "dark," yet remains subject to the same unbundling requirements applicable to operating loops. Despite this broad definition, ILECs have applied a different, more restrictive definition that has the effect of denying access to the vast bulk of dark fiber loops: any loop not terminated on ILEC equipment is not dark fiber and need not be unbundled at all.²¹

As is plain from the definition adopted in the *UNE Remand Order*, the ILECs have assumed, without basis, an incorrect and overly restrictive definition of dark fiber. That definition allows the ILECs to avoid compliance with unbundling obligations simply by changing their standard loop provisioning practice, that is, to lay new loop fiber without terminating it. The ILECs plainly are making a distinction without a difference: the clear object of the dark fiber unbundling rule is to make as much loop fiber available to competitors as possible, without artificial distinctions as to whether the loop is in use. Moreover, condoning such self-regulation by any carrier undermines the Commission's authority to implement and enforce Congress's mandates. Dominion therefore provides a proposed amendment to Rule

¹⁹ Letter from Rep. John Conyers, Jr., et al. to Michael K. Powell, Chairman, FCC (January 24, 2003).

²⁰ *UNE Remand Order*, 15 FCC Rcd. at 3771 n.292 (quoting Harry Newton, Newton's Telecom Dictionary, 14th Ed. at 197-98 (Flatiron Publishing, New York, 1998)).

²¹ Several CLECs have discussed this practice. E.g., CLEC Coalition Reply Comments at 55; Norlight Ex Parte at 5-6; El Paso Ex Parte at 2-3.

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51.319 that will codify the Commission's definition of dark fiber, as articulated in the *UNE Remand*, to prevent such practices.

ILECs Must Provide Complete Information About Dark Fiber to Requesting CLECs

As many commenters have stated throughout this proceeding, rules mandating the unbundling of loops have little competitive force if not accompanied by rules mandating the provisioning of loop information. For this reason, the Commission has imposed sophisticated rules that require ILECs to provide information about local loops to requesting carriers, including their location, composition (for example, copper or fiber), and electrical parameters.²² These rules have been instrumental in the development of the competitive broadband industry, and most notably competitive Digital Subscriber Line (DSL) services.

In the context of dark fiber loops, however, the ILECs do not observe the same information requirements. As a result, requesting carriers are unable to obtain dark fiber loop information — most importantly, its location — except in response to a completed loop order. This system has devolved into a cumbersome guessing game,²³ preventing CLECs from planning their deployment and denying them efficient access to dark fiber loops. Given that ILECs are presently required to provide, and have provided, loop information for xDSL-capable loops, it seems self-evident that ILECs do possess some measure of information about the location of dark fiber loops. Several state commissions have thus held that failure to provide dark fiber information is discriminatory, and have imposed specific information provisioning requirements.²⁴ Dominion therefore suggests that, to ensure national uniformity of rules, the Commission amend Rule 51.319 to require the same type of information availability for dark fiber loops that presently applies to loops already in use.

Dark Fiber Provisioning Obligations Must Include "Patch-Through" Arrangements

Finally, the provisioning of dark fiber has been significantly restricted due to the ILECs' refusal to connect non-contiguous strands of dark fiber to create a complete circuit. Presently, ILECs, notably Verizon, will not provide such a complete circuit even where two strands terminate to the same wire center or other centralized location.²⁵ ILECs will, however, splice these dark fiber strands together for their own use, rendering their subsequent refusals unreasonable and discriminatory. As is the case with dark fiber loop information, several state commissions have adopted dark fiber splicing requirements for this reason.²⁶ Dominion suggests that the Commission should adopt similar rules as a matter of federal law, in order to ensure that its existing rules for dark fiber unbundling are followed as a matter of ILEC practice.

²² See *UNE Remand Order*, 15 FCC Rcd. at 3885-86 ¶ 427-430.

²³ The CLEC Coalition has termed this process a "game of 'Battleship.'" CLEC Coalition Comments at 54.

²⁴ See *El Paso Ex Parte* at 7.

²⁵ See CLEC Coalition Reply Comments at 55-56. See also *Norlight Ex Parte* at 7; *El Paso Ex Parte* at 3-4.

²⁶ See *El Paso Ex Parte* at 5.

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Proposed Amended Rule 51.319(a)(1)

Dominion proposes the following amended Rule 51.319 to remedy the provisioning failures described above. New language appears in bold. Existing language governs where no replacement is supplied.

(a) Local loop and subloop. * * *

(1) The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office, **whether or not terminated to that equipment**, and the loop demarcation point at an end-user customer premises, **whether or not connected to equipment**, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber * * *

(i) **Dark fiber.** No carrier will be deemed in compliance with the requirements of this subsection unless they provide all requesting carriers, wherever technically feasible, with (x) information about dark fiber loop facilities, including its location, transmission capability, and physical composition, in a just, reasonable and nondiscriminatory manner, and (y) completed physical connections between non-contiguous strands of dark fiber loops if a complete and contiguous dark fiber loop facility does not exist or is not available.

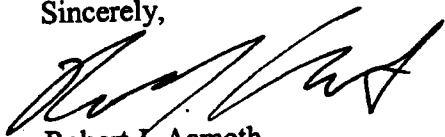
CONCLUSION

The role of dark fiber in enabling the growth of competition demonstrates that its absence would materially impair CLECs in providing competitive services to American consumers. The Commission therefore should retain dark fiber loops as an element that must be provided on an unbundled basis, and should adopt Dominion's proposed amendments to Rule 51.319 to ensure that dark fiber loops are provisioned in just, reasonable and nondiscriminatory manner in keeping with Congress's mandates in Section 251.

KELLEY DRYE & WARREN LLP

Chairman Michael K. Powell
January 28, 2003
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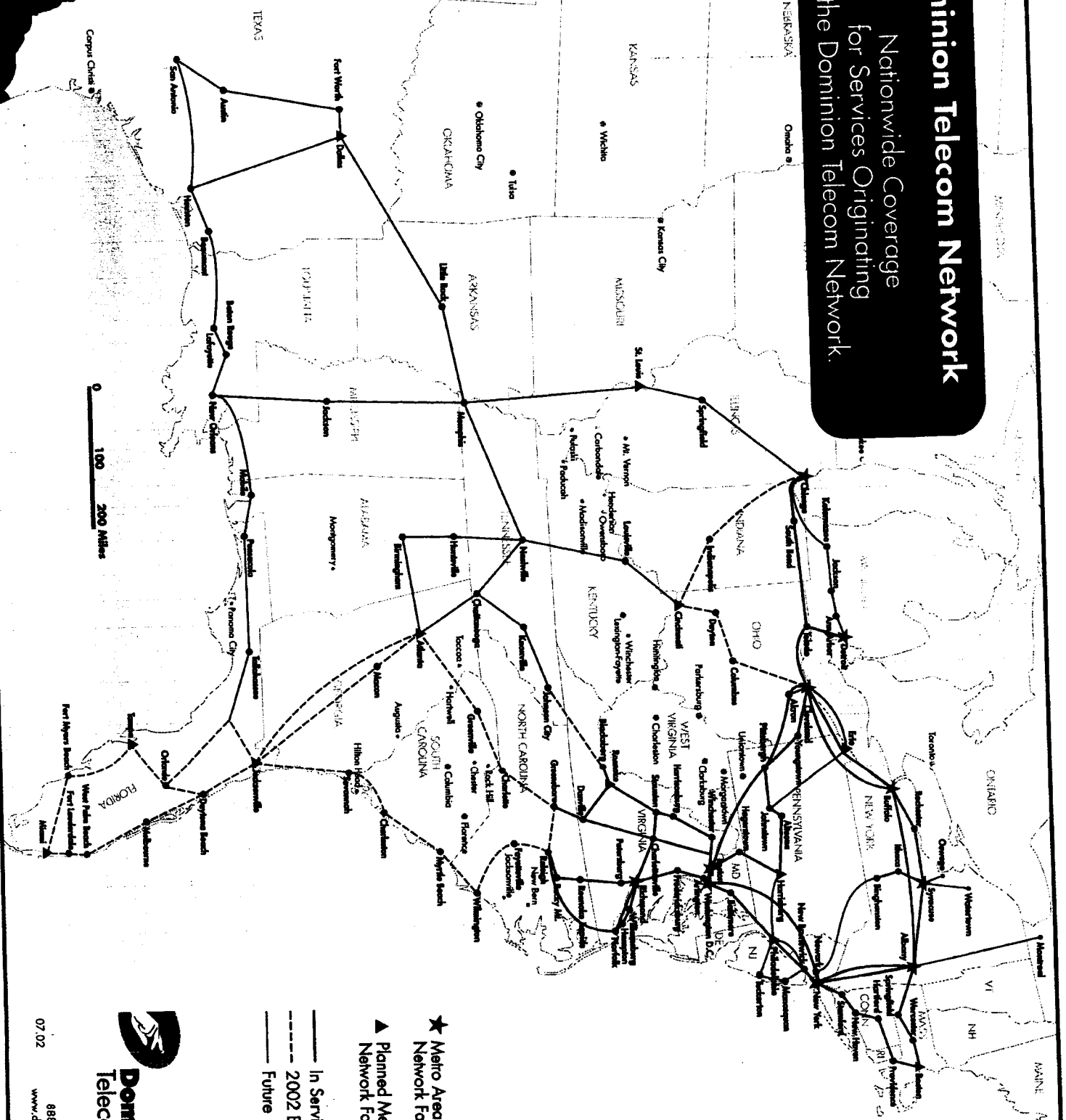
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for Services Originating
on the Dominion Telecom Network.



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January 22, 2003

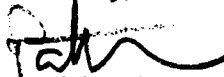
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte
CC Docket No. 01-338

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on January 21, 2003, Stephen Crawford, General Counsel, El Paso Networks, LLC, and Pete Manias, Senior Vice President, met with Commissioner Kathleen Abernathy and Matthew Brill; and on January 22, 2003 met with Christopher Libertelli, Office of the Chairman; and Jordan Goldstein, Office of Commissioner Michael J. Copps, concerning issues in the above-captioned proceeding. Jonathan Askin, General Counsel, ALTS, attended the meeting with Christopher Libertelli. El Paso presented the views set forth in the attached document which was provided at the meetings.

Sincerely,



Patrick J. Donovan

El Paso Networks, LLC

- El Paso provides wholesale telecommunications services to CLECs, IXCs, CMRS providers, and ISPs.
- Purchases as UNEs DS-1 and DS-3 loops, EELs, and dark fiber loop and interoffice transport.
- Wholesale business model promotes innovation, facilities-based competition.
- El Paso has invested more than \$500 million in its own telecommunications network.
- El Paso offers services on a detariffed, common carrier basis. El Paso is not engaged in “private carriage.”

Dark Fiber (Interoffice and Loop)

- El Paso is “impaired” without unbundled access to ILEC dark fiber. There are no alternatives to ILEC dark fiber over the vast majority of interoffice routes.
- A granular test should be route-specific. An MSA or other wide area test is non-granular and would leave CLECs impaired over specific routes.
 - Wholesale alternative – four or more providers over the route. Must not be mooted by any “contestability” test.
- Capacity based exclusion would be irrational in that there is no clear relationship between impairment and capacity.

Use Restrictions

- FCC must accommodate a variety of business plans and CLEC architectures. Narrow criteria would preclude wholesalers.
- Nuvox approach: two or three of: state certification, LEC services, interconnection trunks, collocation, or telephone numbers.
 - Local point-to-point data is a LEC service.
- A wholesaler, if it does not itself meet any of these criteria, must be permitted to certify that its customers meet some or all of these criteria.

- Presumption in favor of provisioning.

DS-1 and Above UNE Loops

- CLECs are impaired without, and have no alternatives to, unbundled access to ILEC loops.
- Use restrictions completely unnecessary for stand-alone UNEs.
- IXC's since 1996 have not sought to substitute stand-alone UNEs for access. IXC's enjoy substantial access discounts. Provisioning change-over not worth the savings.
- *Comptel* authorized use restrictions for EELs, but did not require them for any UNEs or combinations.
- The FCC should monitor IXC practices.

Cell Site Interconnection

- CLECs are impaired without, and have no alternatives to, unbundled DS-1 access to CMRS cell sites.

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TOKYO, JAPAN

February 6, 2003

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Ex Parte*: Review of the Unbundling Obligations of Incumbent Local Exchange Carriers—CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—CC Docket CC No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability—CC Docket No. 98-167**

Dear Ms. Dortch:

OnFiber Communications, Inc. ("OnFiber"), by its attorneys, hereby submits this *ex parte* letter in support of recent filings by Dominion Telecom, Inc., and several other parties, regarding the unbundling of dark fiber loops.¹ OnFiber submits that the record of this proceeding clearly demonstrates that dark fiber loops meet the Section 251(d)(2) statutory impairment standard, and therefore, the Commission should continue to require that unbundled dark fiber loops be provided to requesting carriers on a just, reasonable and non-discriminatory basis.

Founded in 1999, OnFiber is a leading builder and operator of fiber optic networks in the United States. OnFiber operates fiber optic networks in twelve major

¹ See Letter from Robert J. Aamoth, Kelley Drye & Warren, and Alan J. Dole, Dominion Telecom to Chairman Powell, CC Docket Nos. 01-338 *et al.* (Jan. 28, 2003); Joint Comments of NuVox, KMC, e.spire, TDS Metrocom, MFN, and SNiP LiNK, Docket No. 01-338, at 77-80 (filed Apr. 5, 2002) ("CLEC Coalition Comments"); Joint Reply Comments of NuVox, KMC, e.spire, TDS Metrocom, MFN, and SNiP LiNK, at 53-57 (filed July 17, 2002) ("CLEC Coalition Reply Comments"); *Ex Parte* Presentation of El Paso Networks, LLC and Conversant Communications, LLC, Docket Nos. 01-338 *et al.* (Nov. 26, 2002) ("El Paso *Ex Parte*"); Letter from Lawrence R. Freedman, Counsel for Norlight Telecommunications, Inc. to Marlene Dortch, Secretary, FCC, Docket Nos. 01-338 *et al.* (filed Dec. 20, 2002) ("Norlight *Ex Parte*").

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Page 2

metropolitan areas, including: Atlanta, Chicago, Dallas, Denver, Houston, Los Angeles, New York City, Miami, Philadelphia, San Francisco, Seattle and Washington D.C. OnFiber provides connectivity solutions between major traffic aggregation points on the network, as well as fiber-optic local loop connectivity. OnFiber's metro core network provides the "backbone" infrastructure that connects traffic aggregation points such as data centers, carrier hotels, and other service provider points of presence ("POPs") to the access network, which extends a direct fiber connection to enterprise businesses and commercial buildings OnFiber's "Homerun"™ fiber loops. However, without continued access to unbundled dark fiber loops, OnFiber's ability to effectively operate its network would be in severe jeopardy.

Given the role of dark fiber in enabling the growth of local telecommunications competition, OnFiber submits that eliminating the dark fiber unbundling requirement would materially impair CLECs in providing competitive services to American consumers. We submit that the Commission can require that dark fiber be unbundled pursuant to virtually any unbundling standard adopted in this proceeding. OnFiber agrees with Dominion, and other commenters in this proceeding, that dark fiber loops clearly meet the Section 251(d)(2) "impair" test. Specifically, without unbundled access to dark fiber loops, carriers such as OnFiber would be unable to provide the services that they seek to offer.² The Commission's impairment analysis must be undertaken against the backdrop of the D.C. Circuit's decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), wherein the *USTA* court instructed the Commission with regard to the competitive need for a particular element to establish an impairment standard that "point[s] to something a bit more concrete"³ than the nationwide unbundling rules the Commission previously adopted.

As Dominion demonstrated, the vast expense associated with deployment of dark fiber loop architectures preclude self-provisioning prohibitively expensive and prevents the development of any kind of "alternate" or third party market from developing. Under these circumstances—where there is no practical, economic, and operational substitute for a UNE—the Commission must continue to require that dark fiber be unbundled. In order to provide services to customers on a cost effective and ubiquitous basis, OnFiber must have access to "last mile" facilities to interconnect end-users with its extensive metro backbone networks.

Without continued access to unbundled dark fiber loops at TELRIC rates, OnFiber will not be able to fully utilize its network, and its entry into new markets will be severely restrained, if not completely undermined. The Commission, therefore, should continue to require that dark fiber loops be provided on an unbundled basis and free of use restrictions. Further, the Commission should adopt Dominion's proposed amendments to Rule 51.319, as set forth in its January 28, 2003 *ex parte*, to ensure that dark fiber loops are provisioned in a just,

² See 47 U.S.C. § 251(d)(2) ("In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.").

³ *USTA*, 290 F.3d at 425.

KELLEY DRYE & WARREN LLP

Marlene Dortch
February 6, 2003
Page 3

reasonable and nondiscriminatory manner in keeping with Congress's mandates under Section 251.

Sincerely,



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Christopher Libertelli, Legal Advisor to Chairman Powell
Daniel Gonzalez, Senior Legal Advisor to Commissioner Martin
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Jordan Goldstein, Senior Legal Advisor to Commissioner Copps
Lisa Zaina, Chief Legal Advisor to Commissioner Adelstein

Memorandum of Ex Parte Presentation

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

***Re: Ex Parte Presentation, CC Docket Nos. 01-338, 96-98, 98-147, Review of the
Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers***

Dear Ms. Dortch:

El Paso Networks, LLC ("EPN") and Conversent Communications, LLC hereby submit the attached position paper in order to provide the Commission with additional information regarding the obligations of Incumbent Local Exchange Carriers ("ILECs") to provide unbundled dark fiber under the Telecommunications Act of 1996. EPN and Conversent submit this position paper in response to inquiries from the Commission staff regarding the investments CLECs must make in order to use dark fiber, the ways in which CLECs use dark fiber, the existence of non-ILEC sources of dark fiber, and the appropriate impairment standard.

We are submitting this filing electronically in accordance with the Commission's rules.

Please include a copy of this submission in the record of the above-listed proceedings. You may contact either or both of us at the addresses below should you have any questions.

Respectfully,

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Attachments

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Claudia Pabo
Steven Morris
Aaron Goldberger
Gina Spade

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

**I. AVAILABILITY OF DARK FIBER ON EFFICIENT TERMS AND CONDITIONS
ADVANCES THE COMMISSION'S GOAL OF PROMOTING FACILITIES-
BASED COMPETITION.**

Because competitive local exchange carriers ("CLECs") must make a substantial investment in equipment in order to light and use unbundled dark fiber obtained from incumbent local exchange carriers ("ILECs") and this fiber typically forms an integral and even essential part of the CLEC's network, unbundled dark fiber promotes facilities-based competition in a unique way. In fact, El Paso Networks, LLC ("EPN") has invested almost \$400 million to light the unbundled dark fiber that it has obtained from SBC Communications, Inc. ("SBC") in its area of operations - Texas. Similarly, Conversent Communications, LLC ("Conversent"), to date, has spent over \$30 million in capital costs in connection with its fiber networks.¹ This sizable investment is necessary to engineer, purchase, and install advanced optronics, multiplexing equipment, Dense Wave Division Multiplexing ("DWDM") equipment, and other advanced electronics to light and use the dark fiber. By investing such large sums to light unused, spare dark fiber, CLECs make efficient use of this excess fiber capacity as compared to leaving this excess fiber unused in the ILEC network. Further, CLEC investment in advanced telecommunications equipment and software to light dark fiber provides substantial revenue to telecommunications equipment providers in these challenging economic times.

In addition to the substantial investment in electronics to light the dark fiber, competitive carriers utilize dark fiber as an integral part of their network. This enables CLECs to offer more rigorous service level commitments to customers, to more effectively manage and maintain their networks, and to provide a wider variety of services than is possible with a market entry strategy that depends upon a hybrid network that is comprised of CLEC facilities and unbundled lit loops and transport. In sum, a market entry strategy that relies on use of unbundled dark fiber still requires a substantial investment by the CLEC to seamlessly incorporate the dark fiber into its network and is the closest approach to a pure facilities-based market entry strategy, as contrasted with CLEC use of other unbundled network elements ("UNEs"). CLEC use of this excess ILEC dark fiber provides needed revenue to telecommunications equipment providers and promotes facilities-based competition by enabling CLECs to share in the ubiquity of ILEC networks, which were developed under the protection of their historic government-sanctioned monopolies.

¹ Ex Parte Presentation of Conversent to Christopher Libertelli, dated October 22, 2002, at 3.

II. THE COMMISSION SHOULD CLARIFY ITS DEFINITION OF DARK FIBER TO ENSURE THAT REQUESTING CARRIERS CAN OBTAIN DARK FIBER ON EFFICIENT TERMS AND CONDITIONS.

Over the past three years, the Commission has treated unbundled dark fiber as included within the definition of the dedicated interoffice transport and loop network elements.² More specifically, the Commission found that dark fiber is “a feature, function, and capability of” these unbundled transport and loop facilities.³ In light of the substantial CLEC investment required to equip unbundled dark fiber for use as an integral part of the requesting CLEC’s network, the Commission should revisit this approach and establish unbundled dark fiber as a stand alone UNE. Further, based upon the extensive experience of state commissions and evidence regarding how CLECs use dark fiber in the market place, the Commission should clarify the definition of the dark fiber UNE to ensure that it more fully facilitates local competition and reflects the unique nature of this UNE.

As set forth in detail in EPN’s comments, ILECs have stunted competitive investment by carriers seeking to use unbundled dark fiber by unreasonably manipulating the Commission’s language in the *UNE Remand Order* to shield significant portions of their deployed dark fiber from availability. This discrimination against competitive entrants has substantially impeded CLEC access to dark fiber that is deployed in the ground and ready to be used once the CLEC makes the significant investment in equipment necessary to “light” the dark fiber. As set forth in detail below, several state commissions responding to the real-world practices of the ILECs have clarified the Commission’s existing rules by requiring ILECs to provide access to dark fiber regardless of whether it is spliced end-to-end and terminated, by detailing the information ILECs must provide CLECs regarding dark fiber availability, location and quality, and by imposing other requirements. The Commission should adopt these best practices as national rules governing nondiscriminatory access to UNE dark fiber. Adoption of these best practices of the state commissions is necessary not only to foster investment and innovation by competitors that will seek to use the network element that is most difficult to duplicate, the transmission facility, but is also required under the core principles of non-discrimination embodied in the Act.

First, ILECs should be required to provide access to unspliced and unterminated fiber on a nondiscriminatory basis. One significant “loophole” in the existing definition of dark fiber that the ILECs have concocted and then used to deny access to UNE dark fiber is based upon the Commission’s statements in the *UNE Remand Order* that “dark fiber is physically connected to facilities”⁴ and that dark fiber is “fiber optic cable connecting within two points within the

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No 96-98, FCC 99-238, at ¶¶ 167, 174, 325-26 released Nov. 5, 1999 (“*UNE Remand Order*”) (“we modify the definition of dedicated transport to include dark fiber.” ... “We modify the definition of the loop network element to include all features, functions, and capabilities of the transmission facilities, including dark fiber and attached electronics.”)

³ *UNE Remand Order*, at ¶¶ 167, 326.

⁴ *UNE Remand Order* ¶ 174 n. 323.

incumbent ILEC's network."⁵ Using this language as a pretense, the ILECs have "refused to run the connections between fiber patch panels [termination] or to make routine fusion splices – something they have dedicated splicing crews do every day to bring their own fiber into service."⁶

ILECs regularly deploy fiber in segments with planned "breaks" in the path.⁷ These planned breaks also occur at points where larger backbone cable meets smaller distribution or lateral cables that connect to specific customer locations or remote terminals.⁸ In order to build maximum flexibility in how it uses its deployed fiber, the ILEC will place splice cases at these mid-span breaks. At these splice cases the ILEC can splice strands of fiber together in order to complete a path from one location (usually an ILEC central office) to another location, (usually a customer premises, remote terminal or with interoffice fiber another central office).⁹ Deployed fiber is also frequently left unconnected when that fiber path ends at a customer premises or remote terminal.¹⁰ When there is additional demand for that fiber, additional fiber will be terminated. The function of termination actually involves a splice.¹¹

When the issue has been raised, many state commissions have recognized that the ILEC's refusal to splice and terminate dark fiber for CLECs violates their unbundling obligations and unreasonably limits the amount of unbundled dark fiber available to CLECs. SBC, for example, has argued before state commissions in California, Indiana and Texas, that because un-terminated fiber is not connected to equipment at the customer location at the termination point it need not be unbundled. The California Public Utilities Commission ("California PUC") rejected SBC's contention noting that it "is an attempt to define away its legal obligations"¹² and that the California PUC did "not want to set a rule in place that would allow [SBC] to evade its obligations to unbundle dark fiber for CLECs, as mandated by the FCC."¹³ Likewise, SBC made similar assertions with a similar result before the Texas Public Utilities Commission ("Texas PUC"). The Texas PUC found:

⁵ Id. at ¶ 318 n. 628.

⁶ EPN Comments, at 48-50; EPN Reply Comments, at 48-50; Sprint comments at 28.

⁷ Joint Comments of El Paso Networks, CTC Communications, ConEd Communications, CC Dkt. No. 01-338, 96-98, 98-147, filed April 5, 2002, ("EPN Comments"), at Ex. 5, Testimony of R. Passmore, at 6; EPN Reply Comments, at 49.

⁸ EPN Comments, at 7; EPN Reply Comments, at 49.

⁹ EPN Comments, at 6-7, 11; EPN Reply Comments, at 49.

¹⁰ EPN Comments, Ex. 8 Townes Rebuttal Testimony at 1; EPN Reply Comments, at 50.

¹¹ EPN Comments, Ex. 12 Declaration of Patricia Hogue at 2 ("ILECs routinely perform a fusion splice to connect a fiber pigtail to a fiber cable in a splice tray").

¹² *Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCI Metro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-01-010, Final Arbitrator's report Cal. PUC, July 16, 2001 at 129; EPN Reply Comments, at 50.

¹³ Id. at 130.

that SWBT incorrectly interprets the FCC's intention. SWBT states that, consistent with the FCC's mandate in Paragraph 328, it is only obligated to provide dark fiber as a UNE if the fiber connects two points in SWBT's network. The Arbitrators, however, agree with CoServ's argument that "connectivity does not equal termination." Consequently, the Arbitrators find that the *UNE Remand Order* discussed connectivity in the context of distinguishing dark fiber that was already "in place and called into service" from the example of unused copper wire "stored in a spool in a warehouse."¹⁴

Accordingly, the Texas PUC ruled that "unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber," and that "[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request."¹⁵ The Texas PUC explained its decision by noting that it found "no reason to distinguish between fiber that is deployed and spliced and fiber that is deployed and un-spliced; doing so would limit [CLECs'] ability to request UNE dark fiber."¹⁶

The *UNE Remand Order* describes its connection standard as meaning that the fiber is "in place."¹⁷ Even if a strand is not spliced, it is still "in place." The ILEC has already deployed the fiber in its network, along a given route, typically underground. The fact that the fiber strand is not yet spliced at certain points no more renders it "unconnected" to the SWBT network than does the fact that a strand is not yet terminated. Like unterminated fibers, fibers that have been deployed in cables but not yet spliced are within the FCC's definition of unbundled dark fiber.¹⁸

Whether or not a loop has been spliced or not does not change the fact that the fiber cable is connected to SWBT's network and is easily called into service; therefore, both spliced and unspliced dark fiber fit within the FCC's definition of dark fiber UNEs, just as unspliced and unterminated copper dead count falls within the definition of unbundled loops.¹⁹ It is clear that un-spliced or un-terminated dark fibers have been deployed and are connected to the ILEC network. This fiber is not lying idle on a spool in a warehouse. Rather, extensive funds have been spent to secure rights of way, dig up city streets, lay the conduit and fiber along the proper path to the respective customer premise or central office, close up the trenches and re-pave the city streets. This fiber is deployed, in-place fiber.

Because the splicing process is routine and is performed by legions of ILEC trained full-time splicing specialists, unspliced fiber is easily called into service. The most obvious evidence that unspliced fibers can be easily called into service is the fact that ILECs perform thousands of

¹⁴ *Petition of CoServ, Inc. et al for Interconnection Agreement with SWBT*, Docket 23396, Arbitration Award at 113-114, TX PUC, April 17, 2001; EPN Reply Comments, at 51-52.

¹⁵ *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone*, Docket No. 25188, at 139, TX PUC, July 31, 2002 ("EPN Texas Revised Arbitration Award").

¹⁶ EPN Texas Revised Arbitration Award, at 139.

¹⁷ *UNE Remand Order* ¶ 174.

¹⁸ EPN Reply Comments, at 51.

¹⁹ EPN Reply Comments, at 51-53.

fiber splices for their own use. Indeed, the work is so routine, SWBT currently charges EPN only \$434 per dark fiber splice location, regardless of how many splices it performs for EPN. Further, SBC performed approximately 300 fiber splices for EPN, apparently without experiencing any difficulty, before it began to refuse to provision UNEs for which splicing is required.²⁰ Finally, SBC is also required to splice dark fiber in Indiana and Ohio, and other ILECs perform splicing for CLECs in other states.²¹

In light of these facts, the Commission should adopt the best practices regarding splicing and termination of dark fiber developed by state commissions around the country and incorporate their findings into its national rules. As discussed above, the Texas PUC recently ruled that “unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber,” and that “[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request.”²² Several other state commissions, including those in the District of Columbia,²³ Indiana,²⁴ Massachusetts, New Hampshire²⁵ and Rhode Island²⁶ have examined the issue and have ordered ILECs to splice dark fiber for requesting CLECs.²⁷ For example, the Massachusetts Department of Telecommunications and Energy (“MA DTE”) dismissed the arguments raised by Verizon regarding the technical feasibility of splicing dark fiber and concluded “that it is *technically feasible* and *consistent with industry practice* to lease dark fiber at splice points.”²⁸ In fact, the MA DTE concluded that Verizon itself resplices “from time to time” and that those “splice points are designated for [Verizon], itself, to use as junction points in its network.”²⁹ Accordingly, the MA DTE saw “little distinction between a splice

²⁰ EPN Reply Comments, at 53-55, 62-66.

²¹ EPN Reply Comments, at 53-55.

²² EPN Texas Revised Arbitration Award, at 139.

²³ *D.C. Dark Fiber Order*, at ¶ 62, 87.

²⁴ *Re: AT&T Communications of Indiana, Inc.*, Cause No. 40571-INT-03, Slip Opinion, at 79, 129-130 (Nov. 20, 2000) (“Indiana Order”).

²⁵ *Re: Deliberations in DT 01-206 Regarding Rates, Terms and Conditions for the UNE Remand Unbundled Network Elements*, Policy Letter, at 2 (N.H. PUC, March 1, 2002).

²⁶ *In re: Verizon-Rhode Island's TELRIC Studies - UNE Remand*, Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) (“RI Dark Fiber Order”) (“Verizon is required to splice dark fiber at any technically feasible point on a time and materials basis, so as to provision continuous dark fiber through one or more intermediate central offices without requiring the CLEC to be collocated at any such offices.”); Jan. 29, 2002 Tr. at 18:21-186:3.

²⁷ EPN Reply Comments, at 48-66.

²⁸ *New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts*, Decision D.P.U./D.T.E. 96-83, 96-94-Phase 4-N, at 33 (Mass. DTE Dec. 13, 1999) (“We impose no collocation requirement ... it is technically feasible and consistent with industry practice to lease dark fiber at splice points.”) (“Mass. DTE Phase 4N Order”) (emphasis added); *New England Telephone and Telegraph Company d/b/a NYNEX, et al.*, Decision D.P.U. 96/73-74, 96/80-81, 96-84-Phase 4-R Order at 4-5 (Mass. DTE Aug. 17, 2000); EPN Comments, at 12-13.

²⁹ *New England Telephone and Telegraph Company d/b/a NYNEX*, Decision D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 48-49 (Mass. DTE Dec. 4, 1996) (“Mass. DTE Phase 3 Order”).

performed on behalf of [Verizon] and that performed for another carrier” and ordered Verizon to provide access to dark fiber at any technically feasible point including existing splice points as well as hard termination points.³⁰ The MA DTE required Verizon to perform splicing at the CLEC’s request in order to make a fiber strand “continuous by joining fibers at existing splice points within the same sheath.”³¹

The District of Columbia Public Service Commission (“DC PSC”)³² observed that the Indiana commission and MA DTE permit access to dark fiber at splice points³³ and in light of this precedent and other analysis, concluded that Verizon must provide access to dark fiber at splice points.³⁴ The Rhode Island PUC, following the lead of the Massachusetts DTE, ordered Verizon to “splice dark fiber at any technically feasible point so as to make dark fiber continuous through one or more intermediate offices *without requiring the CLEC to be collocated at any such intermediate offices.*”³⁵

On March 1, 2002, the New Hampshire Public Utilities Commission (“NH PUC”) underscored its view that “[d]ark Fiber is an important resource for promoting competition and encouraging broadband deployment in New Hampshire,” and decided to “adopt the [MA DTE] determination that access to existing splice points is technically feasible.”³⁶ In Order No. 23,948, the NH PUC determined that Verizon had “not met its burden to prove technical infeasibility” and directed Verizon to revise its UNE tariff to allow access to dark fiber at existing splice points.³⁷ Likewise in its recent arbitration with SBC in Texas, the Texas PUC required SWBT to allow EPN access to dark fiber at existing splice points and requires that SBC make the splice for EPN.³⁸

³⁰ Mass. DTE Phase 3 Order, at 48.

³¹ Exhibit-03, Mass. DTE No. 17, Miscellaneous Network Services, Part B, § 17.1.1.A.1; Mass. DTE Phase 4N Order, at 33; D.C. Dark Fiber Order, at ¶ 62, 87.

³² TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc., Order No. 12286, Order on Reconsideration, at ¶ 57 (DC PSC Jan. 4, 2002) (“D.C. Dark Fiber Order”).

³³ D.C. Dark Fiber Order, at ¶ 61.

³⁴ D.C. Dark Fiber Order, at ¶ 62, 74, 87.

³⁵ In re: Verizon-Rhode Island’s TELRIC Studies – UNE Remand, Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) (emphasis added).

³⁶ Re: Deliberations in DT 01-206 Regarding Rates, Terms and Conditions for the UNE Remand Unbundled Network Elements, Policy Letter, at 2 (March 1, 2002).

³⁷ Order Approving in Part and Denying in Part Statement of Generally Available Terms and Conditions Additional Unbundled Network Elements, Docket No. DT 01-206, Order No. 23,948, at 21-23 (April 12, 2002); Order Denying Motion for Reconsideration, Rehearing, and/or Clarification, Docket No. DT 01-206, Order No. 23,993, at 18-19 (June 13, 2002).

³⁸ EPN Texas Revised Arbitration Award at p. 161-162 (finding that splicing EPN fiber to SWBT UNE dark fiber at existing splice points and termination points is technically feasible).

In light of the best practices adopted by state commissions, the Commission should seize this opportunity to clarify its rules above, and affirm that ILECs must provide unbundled access to dark fiber that is in the ground and on poles but has not been spliced to other fiber or terminated in a building to provide service in the future on any available path.³⁹

Second, ILECs should be required to provide nondiscriminatory access to dark fiber information and neutral provisioning of dark fiber. The Commission concluded in its *First Local Competition Order*, that the provision of access to Operations Support Systems (“OSS”) “functions and the information they contain is integral to the ability of competing carriers to enter the local exchange market.”⁴⁰ The Commission further concluded that “a requesting carrier that lacks access to the incumbent’s OSS ‘will be severely disadvantaged, if not precluded altogether, from fairly competing.’”⁴¹ In addition, in its *UNE Remand Order*, the Commission clarified that “OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems.”⁴² These astute conclusions remain accurate today and should be reaffirmed by the Commission in rules that require ILECs to provide the same access to information regarding the location, quality, and availability of dark fiber that they provide to their own employees and agents. In the absence of nondiscriminatory access to OSS information regarding dark fiber, CLECs must play a game of “go fish” involving the submission of a series of facility checks or inquires until they hit on the right combination of A and Z locations where fiber is available.⁴³ This cumbersome process often results in the loss of the potential customer to the ILEC whose personnel have unfettered access to databases and maps regarding dark fiber that contains information that is generally unavailable to CLECs.⁴⁴

Several state commissions have recognized the importance of nondiscriminatory access to information regarding the location, quality, and availability of dark fiber. These state commissions have adopted orders that specify exactly what information and documentation the ILEC must provide during the dark fiber UNE preordering, ordering, and provisioning processes. The NH PUC, for example, directed Verizon to “provide initial availability information within

³⁹ For example, in its arbitration with EPN in Texas, SBC contended that it was not obligated to provide unbundled access to dark fiber in the loop plant unless that fiber was deployed between a SWBT serving wire center and the customer premise and claimed that other fiber from wire centers other than the serving wire center was a “Route other Than Normal” or “ROTN” and not available as a UNE. The Texas PUC rejected SBC’s proposed distinction. EPN Texas Revised Arbitration Award at 36-37. By adopting the rule proposed herein by Conversent and EPN, the Commission would prevent ILECs from using definitional artifices to obstruct CLEC access to dark fiber on an unbundled basis.

⁴⁰ *UNE Remand Order*, at ¶ 421; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, at ¶ 518 (1996) (“*First Local Competition Order*”); EPN Reply Comments, at 67-68.

⁴¹ *UNE Remand Order*, at ¶ 421, quoting, *First Local Competition Order*, at ¶¶ 516-516.

⁴² *UNE Remand Order*, at ¶ 425; EPN Reply Comments, at 67-68.

⁴³ EPN Reply Comments, at 69-72; Joint Comments of NuVox, KMC *et al*, at 78.

⁴⁴ EPN Reply Comments, at 68-77.

15 business days” of a dark fiber inquiry.⁴⁵ Where Verizon determines that “no facilities are available,” the information provided within 15 business days must “identify for the CLEC the route triggering the ‘no facilities available’ response, indicate what alternate routes have been investigated, and show the first blocked segment on each route as well as all of those segments which are not blocked.”⁴⁶ Further, the NH PUC requires that if Verizon determines that dark fiber is unavailable, unless the CLEC affirmatively declines by checking a box on the dark fiber inquiry form, Verizon shall provide a written response within thirty (30) days of the CLEC’s dark fiber inquiry that sets forth specific reasons why dark fiber cannot be provided and must include, at a minimum, the following information:⁴⁷

total number of fiber sheath and strands between points on the requested routes, number of strands currently in use and the transmission speed on each strand (e.g. OC-3, OC-48), the number of strands in use by other carriers, the number of strands reserved for Bell Atlantic’s use, the number of strands lit in each of the three preceding years, the estimated completion date of any construction jobs planned for the next two years or currently underway, and an offer of any alternate route with available dark fiber. In addition, for fibers currently in use, Bell Atlantic shall specify if the fiber is being used to provide non-revenue producing services such as emergency service restoration, maintenance and/or repair.⁴⁸

Such information is essential in order for a CLEC to determine the veracity of any claim by an ILEC that dark fiber is not “available” on a particular route and to determine whether alternative routes are available.⁴⁹ Following the lead of the NH PUC, the Rhode Island Public Utilities Commission also required Verizon to assume the responsibility of identifying alternative dark fiber routes between central offices requested by a CLEC where the route requested by the CLEC is unavailable because Verizon “is the entity most familiar with its own network configuration.”⁵⁰ Similarly, the New Jersey Board of Public Utilities recently directed Verizon “to provide specific details to the CLEC and staff for review within five calendar days of the

⁴⁵ *Order Approving in Part and Denying in Part Statement of Generally Available Terms and Conditions Additional Unbundled Network Elements*, Docket DT 01-206, Order No. 23,948, at 7 (April 12, 2002) (“Order No. 23,948”).

⁴⁶ Order No. 23,948, at 7.

⁴⁷ *Order Finding Dark Fiber Subject to the Unbundling Requirement of Section 251 of the Telecommunications Act of 1996*, Order No. 22,942, DE 97-229, at 8-9 (May 19, 1998) (“NH Dark Fiber Order”).

⁴⁸ *NH Dark Fiber Order*, at 8 (emphasis added); Order No. 23,948, at 7.

⁴⁹ On September 5, 2001, for example, Verizon rejected a request by CTC for dark fiber transport from Verizon’s central office at 266 Main Street, Burlington, Vt. CLLI BURLVTMA to CTC’s POP at 1193 South Brownell Rd. CLLI VLSTVT07. See, e.g., Exhibit-11, Vermont Dark Fiber Inquiry Form.

⁵⁰ *In re: Verizon-Rhode Island’s TELRIC Studies – UNE Remand*, Docket No. 2681, Report and Order, at 22 (Rhode Island PUC, Dec. 3, 2001).

rejection” in order for the CLEC to “have the ability to challenge any claims by Verizon NJ that sufficient dark fiber does not exist.”⁵¹

In addition, the Maine Public Utilities Commission (“ME PUC”) has determined that as a condition of a favorable Section 271 recommendation, if Verizon believes that dark fiber is unavailable, then within thirty (30) days of a separate request from a CLEC, Verizon must provide the CLEC with “written documentation and a fiber map.”⁵² The written documentation must include, at a minimum, the following detailed information:

- a map (hand-drawn, if necessary) showing the spans along the most direct route and two alternative routes (where available), and indicating which spans have spare fiber, no available fiber, and construction jobs planned for the next year or currently in progress with estimated completion dates;
- the total number of fiber sheaths and strands in between points on the requested routes;
- the number of strands currently in use or assigned to a pending service order;
- the number of strands in use by other carriers;
- the number of strands assigned to maintenance;
- the number of spare strands; and
- the number of defective strands.

Finally, the Texas PUC recently recognized that “EPN is attempting to buy unbundled dark fiber and cannot reasonably do so without knowledge of where such fiber exists.”⁵³ Accordingly, the Texas PUC concluded that “CLECs are entitled to all information available in SWBT’s backend systems, not a subset of that information that SWBT chooses to provide.”⁵⁴ Therefore, the Texas PUC concluded that “in response to an EPN facility check request, SWBT’s engineers will detail any and all facilities in or near the building that can be used for possible service to the customer,” and will supply “all information relevant to EPN’s request, including, but not limited to, fiber route and path information.”⁵⁵

In sum, the Commission should adopt the best practices of these state commissions and should specify that its OSS rules require ILECs to afford CLECs nondiscriminatory, parity access to maps and data regarding the location and characteristics of dark fiber. The current lack of a specific rule requiring such access impedes a CLECs ability to locate dark fiber and allows

⁵¹ *NJ Dark Fiber Order*, at 248.

⁵² *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Letter of Dennis L. Keshl (March 1, 2002) (“*Maine Section 271 Order*”).

⁵³ *Petition of El Paso Networks, LLC For Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Co.*, PUC Docket No. 25188, Revised Arbitration Award, at 41 (Texas PUC 2002) (“*Texas Revised Arbitration Award*”); EPN Reply Comments, at 74.

⁵⁴ *Texas Revised Arbitration Award*, at 40.

⁵⁵ *Texas Revised Arbitration Award*, at 40, 56, 64, 67.

the ILEC to “hide the ball,”⁵⁶ and force the CLEC to “guess” where fiber is located.⁵⁷ Information about where the UNEs are available and what facilities are available is essential to the proper functioning of the market.⁵⁸ At a minimum, the ILECs should be required to provide CLECs maps showing where fiber was deployed.⁵⁹

Based on both EPN’s and Conversent’s experience regarding how dark fiber is actually deployed by ILECs and used by CLECs, and the extensive experience of state commissions regarding dark fiber UNEs, the Commission should adopt the following definition of unbundled dark fiber:

The unbundled dark fiber network element consists of all unlit fiber in place within the incumbent LEC network, including any splicing or cross connects required to provide an uninterrupted transmission path between two points selected by the requesting carrier, that can be used for the provision of a telecommunications service. Notwithstanding the foregoing, the incumbent LEC may reserve an appropriate number of strands of dark fiber as maintenance spares to be used to restore services provided by the incumbent LEC and other carriers on a nondiscriminatory basis. The dark fiber UNE includes any necessary splicing of the fiber to create a continuous optical transmission path from any point(s) on the incumbent LEC network to interconnect with the requesting carrier’s, the incumbent LEC’s, or a third-party’s collocation facilities, termination equipment, or lit fiber network, or to connect to the requesting carrier’s customer. To the extent technically feasible, requesting carriers may access dark fiber at existing splice cases and at intermediate wire centers or central offices without the need for collocation at each wire center or central office. Incumbent LECs are required to provide nondiscriminatory access to the same information regarding the availability, location, performance, and condition of incumbent LEC dark fiber that is available to any incumbent LEC employee or agent, including any maps or other data showing the availability and location of incumbent LEC fiber strands. Such nondiscriminatory access requires the incumbent LEC to provide the CLEC electronic access to such maps and data when the incumbent LEC personnel has electronic access. A requesting carrier may use unbundled dark fiber to provide any service that the fiber is capable of supporting, as long as the requesting carrier is using the dark fiber at least in part to provide a telecommunications service.

⁵⁶ EPN Reply Comments, at 76-77; Conversent Comments, Graham Decl. ¶ 32.

⁵⁷ Conversent comments, Graham Decl. ¶ 32.

⁵⁸ Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone, Docket No. 25188, TX PUC, Hearing Transcript, April 22-25, 2002, at pp. 358-359.

⁵⁹ Conversent comments, Graham Decl. ¶ 32.

In providing optical network services, competing carriers are able to offer many telecommunications services to their customers that are cheaper and are superior in terms of bandwidth capacity, reliability, and transmission provisioning performance than those services typically available from traditional telecommunications carriers. For example, CLECs use dark fiber to provide wavelength services, SDSL, integrated DS-1 service and other advanced services. This superior performance comes at substantial cost to these carriers, as the optonics equipment that they must deploy is one of the most expensive parts of an optical network—. ⁶⁰ In light of the substantial investment that CLECs must make to employ unbundled dark fiber in contrast with UNE loops and transport, the Commission should make unbundled dark fiber a stand alone UNE.

III. THE COMMISSION SHOULD RULE THAT REQUESTING CARRIERS ARE IMPAIRED IN THE ABSENCE OF DARK FIBER UNLESS FOUR SUBSTITUTES ARE AVAILABLE.

In its decision in *USTA v. FCC*, the D.C. Circuit explained that the Commission must consider the extent to which the entry barriers associated with obtaining a network element from a source other than the ILEC in a particular market are significant enough (because the UNE shares the attributes *to some degree* of a natural monopoly) that competition would be harmed absent the imposition of an unbundling obligation. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 426-427 (D.C. Cir. 2002). The court did not bind the Commission to any particular methodology, but it did indicate that the Commission's analysis must take into consideration the economies of scale needed to deploy a network element efficiently and the extent to which competitors have in fact deployed the network element in a particular market. *Id.* at 422 (noting actual switch deployment by 3 or more competitors in 47 of the 50 markets); *id.* at 423 (citing relevance of evidence that competitors had deployed transport in the top 50 markets). In order to conduct an impairment analysis that accounts for these factors, the Commission must employ principles of competition policy that it has used in non-dominance and merger proceedings. These principles can be used to determine the extent to which an ILEC possesses substantial and persisting market power over the provision of a network input needed by the ILEC's competitors. Where this is the case, the ILEC will have the incentive to harm competition by overpricing and in some circumstances denying altogether requesting carriers' access the UNE.

The conventional way to assess the extent to which an ILEC has substantial and persisting market power over the provision of an input like a UNE is to define the relevant product and geographic markets, assess the level of concentration in the relevant market, and then assess the extent to which that level of concentration reflects market power by examining entry barriers in the market. ⁶¹ This general framework can be readily adjusted to the particular

⁶⁰ In fact, CompTel estimates that over \$20 Billion in optical network related capital expenditures has been invested by new, primarily local metro, optical carriers since the inception of the Act. *See* CompTel CapEx Report, pp. 10-13. This does not include optimization of traditional ILEC/IXC/CLEC networks with fiber technology.

⁶¹ *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶ 26 (1997).

circumstances of the impairment analysis. As explained below, the Commission should do so by examining (1) the extent to which requesting carriers can reasonably be expected to substitute their use of one UNE for another (e.g., whether lit transmission facilities are a reasonable substitute for dark fiber); (2) the relevant geographic area in which alternative sources of supply should be deemed substitutes; and (3) the appropriate standard for impairment in light of the relevant barriers to entry in the market. In the following sections, each of these issues is discussed with regard to dark fiber.

A. Dark Fiber Constitutes A Separate “Product Market” For Purposes Of The Impairment Analysis.

As the Commission has recognized, the relevant product market should be defined by reference to customer demand.⁶² That is, where customers view two products as “substitutes” they belong in the same product market. Ideally, the question of whether two products are substitutes is determined by assessing the extent to which customers have and will switch from product A to product B and vice versa in response to an appropriately defined price increase in either A or B. But given that this kind of data is unavailable for dark fiber (or probably for any other UNE) in this proceeding, the Commission should instead examine the manner in which requesting carriers actually use dark fiber and compare that use to the service characteristics of any possible substitutes. In the case of dark fiber, the only possible substitute would be lit transmission facilities. As explained below, however, a close examination of dark fiber demonstrates that it must be viewed as a separate product market for purposes of the impairment analysis.

The most important difference between dark and lit fiber is that dark fiber gives carriers much greater control over the quality of service requesting carriers can offer. This is so for two basic reasons. First, reliance on wholesale lit transport causes requesting carriers to introduce many more potential points of failure than is the case with wholesale dark transport. For example, as Conversent has explained, lit interoffice transport requires that the wholesale provider place a multiplexer on each end of a particular span.⁶³ In order to integrate this transport into its ring topography, Conversent would need to add another multiplexer in between the wholesale carrier’s two multiplexers (which are on the end of two separate transmission links that need to be connected in the central offices where Conversent is collocated for the ring architecture to work). *Id.* at ¶ 21. Thus, if forced to use wholesale lit transport, Conversent would use three multiplexers (two ILEC and one Conversent) in each central office in which it has collocated. Where Conversent uses dark fiber transport, it need only deploy one (Conversent) multiplexer in each central office in which it has collocated. *Id.* Importantly, each additional multiplexer represents an additional potential point of network failure for a carrier. It is obvious therefore that relying on wholesale lit transport adds many more potential points of failure. In Massachusetts, for example, Conversent has shown that relying on lit interoffice

⁶² *Id.* ¶ 26.

⁶³ See Declaration of David A. Graham, filed as Exhibit 1 to the Comments of Conversent Communications, LLC (Apr. 5, 2002) at ¶ 20, Attachment 1 (“Conversent Graham Dec.”).

transport would force it to use 96 more multiplexers, and would thus introduce 96 more potential points of failure, than is the case with dark fiber. *Id.* ¶ 22. Degradation in service quality is almost inevitable where so many additional potential points of failure are added.

Second, a CLEC relying on wholesale lit transport facilities cannot monitor their networks from its Network Operations Center (“NOC”). As a result, CLECs lose the ability to monitor their networks and to ensure timely repair and maintenance. Yet this control is absolutely critical to a CLEC’s ability to compete. Such control extends not only to the deployment and maintenance of its own optical equipment, but also to the ability to monitor the performance of that equipment 24 hours/day, 7 days/week. Reliance on lit transport deprives CLECs of this level of control. Thus, the interoperability of dark fiber with an optical carrier’s existing optonics and network management equipment, and the corresponding level of network performance and control that dark fiber affords, make dark fiber a UNE with properties that are uniquely valuable to optical network services providers.

These service quality problems make it virtually impossible for many purchasers of dark fiber transport to replace that transport with lit transmission facilities. This is because optical network service providers typically need to guarantee a very high level of service quality and commit to the payment of liquidated damages if these service levels are not met. These contract performance commitments are known as “service level agreements,” or “SLAs.” The service levels required under these SLAs in some cases exceed any minimum performance targets that are available under existing ILEC inter/intrastate access tariffs, or state-specific UNE performance standards for equivalent transmission UNEs such as loops or transport. Correspondingly, the consequential damages likely to be suffered by carrier or “critical needs” customers (and, thus, the contractual liquidated damages) may well exceed any comparable refunds or payments that are available in either access tariffs or under state UNE performance assurance plans.

In addition to service quality differences, reliance on dark fiber in some cases allows requesting carriers to provide services that could not be offered using wholesale lit fiber transport. For instance, in some cases, CLECs using dark fiber offer customers services or capacity levels not available from the ILEC special access tariffs. Examples include products such as gigabit Ethernet or the selling of individual wavelengths.⁶⁴ These services are not readily available in the lit service market, but can be and are available from carriers that use dark fiber.

Finally, it is also significant that dark and lit fiber are purchased in different ways. Dark fiber is by its nature raw capacity, free of electronics. The capacity of the circuits established by the carrier purchasing dark fiber are a function of the electronics deployed by the purchasing carrier. Lit transport, on the other hand, is purchased at a defined capacity level (DS1, DS3, etc.) that cannot be changed except by reordering (often a cumbersome and error-prone process). As

⁶⁴ Using DWDM, EPN can divide the capacity of four fiber strands into 16 individual wavelengths, each with a capacity of an OC48. EPN’s customers can purchase an OC48 wavelength. By purchasing the wavelength, EPN’s carrier customers can then obtain lit capacity from EPN yet retain the flexibility to manage and control the capacity and services it provides to its own consumers over its own network.

a result, dark fiber affords purchasing carriers far greater flexibility to adjust the capacity of their networks to meet demand than is the case with lit fiber. With dark fiber, the requesting carrier decides when, how, and how quickly to upgrade or downgrade the capacity of the service based on the needs of its customer. This provides additional benefits to the customer since there is no issue of lack of facilities and the turnaround time is mutually negotiated. This difference in flexibility further reinforces the conclusion that lit and dark fiber are perceived by carrier purchasers as fundamentally different.

For all of these reasons, carriers that seek dark fiber would find wholesale lit facilities to be an unacceptable substitute, and are unlikely to switch to lit transport in response even to a significant price increase in dark fiber. The Commission should therefore view dark fiber as a separate “product market” and conduct an entirely separate impairment analysis for dark fiber on the one hand and unbundled lit transmission facilities on the other.

B. Each Point-to-Point Route On Which ILEC Dark Fiber Exists Constitutes A Separate “Geographic Market” For Purposes Of The Impairment Analysis.

One important aspect of the *USTA v. FCC* decision is its insistence on a granular analysis of impairment where differences in market characteristics exist. *See USTA v. FCC*, 290 F. 3d at 422-23. With regard to transmission facilities like dark fiber, it is clear that requesting carriers view each point-to-point route on which ILEC dark fiber exists as a separate geographic market. Stated differently, a requesting carrier that needs transmission between points A and B cannot substitute that functionality with transmission between points B and C. It follows that each separate point-to-point route on which dark fiber transport exists should constitute a separate geographic market for purposes of the impairment analysis.

This conclusion is consistent with Commission precedent. In the UNE Remand Order, for example, the Commission recognized that each point-to-point route served by a particular transport facility must be examined separately for purposes of impairment. *See UNE Remand Order* ¶ 333. If anything, this conclusion is even more pertinent in light of the logic of the *USTA v. FCC* decision.

It is important to emphasize that a non-ILEC source of supply should not be viewed as an offering in the same geographic market as ILEC dark fiber if the non-ILEC fiber merely passes near one or more of the end points served by the ILEC dark fiber. In other words, the non-ILEC dark fiber must actually connect both end points. The obstacles that stand in the way of constructing a lateral facility to connect the non-ILEC dark fiber provider’s facilities to the end points served by the ILEC are simply too significant to assume that such a network extension could be efficiently constructed. Those obstacles are discussed in detail below. They include the cost, delay, and uncertainty associated with obtaining permits, performing excavation work, and securing necessary access to rights-of-way, pole attachments, and conduit space. But perhaps even more importantly, the costs of constructing facilities such as laterals vary greatly depending on the particular circumstances. For example, Conversent has explained, and EPN agrees, that the per mile construction cost of deploying dark fiber increases by approximately ten times

where the carrier cannot obtain access to underground conduit.⁶⁵ The charges and delays associated with obtaining access to public rights-of-way also vary significantly from municipality to municipality. In addition, it may not even be possible for the non-ILEC supplier to establish physical collocation in an ILEC central office if the supplier does not seek access to UNEs or interconnection with the ILEC. See 47 U.S.C. § 251(c)(6). The demand for the purchase of transmission facilities is also likely to vary widely from one lateral location to another. All of this makes it simply impossible for the Commission to assume that a non-ILEC provider of dark fiber can efficiently extend its network to connect points not already served by that non-ILEC provider.

Finally, even where a non-ILEC source of dark fiber connects end points served by the ILEC's dark fiber, the non-ILEC supplier should not be viewed as actually serving the relevant geographic market unless the ILEC has eliminated the barriers to seamless interconnection between the non-ILEC source of supply and either the requesting carrier's own network or the ILEC's dark fiber. For example, the ILEC must have in fact complied with its legal obligation to provide cross-connects between non-ILEC collocated facilities, in a cost effective, nondiscriminatory, and timely manner, which would include the use of the existing CLEC cabling within the central office. The ILECs must also provide through-testing to ensure adequate service quality, cooperative testing with multiple vendors, and allow CLECs access to any test point in the network to accommodate testing. The ILEC, the non-ILEC supplier and the CLEC must be able to jointly monitor the facility and proactively seek the quality of service necessary on the facility.

C. The Market For Dark Fiber Is Characterized By Unusually High Entry Barriers.

As mentioned, the D.C. Circuit explained in *USTA v. FCC* that the Commission's impairment analysis must be linked to some degree to the extent to which duplication of a particular network element is characterized by higher-than-usual entry barriers, especially economic of scale that might make duplication by numerous competitors wasteful. See *USTA v. FCC*, 290 F.3d at 427. There is little doubt that dark fiber is characterized by very substantial entry barriers generally, and in particular economies of scale (and scope, where multiple services can be provided over the transport).

First, dark fiber is characterized by economies of scale. In absolute terms, the cost of deploying fiber facilities are enormous, including: the estimated \$200,000 to \$528,000 per mile costs of fiber deployment in dense urban areas;⁶⁶ municipal rights of way issues, licensing and the coordination of "street digs" (which can cause serious deployment delays); high municipal fees and other onerous conditions placed upon CLECs, local moratoria on fiber deployment,

⁶⁵ See *Conversent Graham Dec.* 29-30.

⁶⁶ EPN Reply Comments, at 25, 33-34, 41-42; EPN Texas Report, at 35 ("EPN has seen that generally the costs for placement of fiber in metropolitan areas is approximately \$100 per foot.").

collocation costs and delays, and most importantly the continued closure of financial markets to CLECs.⁶⁷

WorldCom, for example, reports that to add a central office to its network would cost at least \$1 million, and the cost would be substantially more if the central office is located several miles from its existing network, which is often the case.⁶⁸ In addition to these costs the CLEC must incur collocation costs that will range from \$15,000 to \$500,000.⁶⁹ EPN's experience in Texas has been that the costs for placement of fiber in a metropolitan area in Texas is approximately \$100.00 per foot.⁷⁰ In addition to the high cost of building out fiber, the cost of building access is also high. Accordingly, in EPN's experience a fiber build of 10 miles at \$100.00 per foot results in build-out costs of approximately 4.5 million dollars for placing the fiber in the ground.⁷¹ If the customer to which the fiber was built purchased a single DS3 from EPN, which has a market price of approximately \$2,400.00 per month it would take over 150 years for EPN to recover the cost of this initial fiber build.⁷² The point can be similarly illustrated by the fact that Conversent generally needs only four dark fiber strands to carry its interoffice traffic. Yet Verizon normally places over 90 strands in its interoffice transmission facilities. Verizon's fixed costs are obviously recovered over a much larger number of strands than would be the case with most competitors.

Such economies of scale deter entry because a potential entrant is faced with the prospect that it will not be able to achieve the minimum viable scale, either by carrying its own traffic on the facilities and/or that of wholesale customers, needed to support such an investment.⁷³ The economies of scale also deter entry because construction of extra fiber may add enough output to drive prices below the profitable level.⁷⁴ Either possibility is realistic given that a particular dark fiber facility can only carry traffic between two points and therefore its owner can only recover the cost of the facility from those that need to send traffic between those two points. Unlike switches, for example, the cost of dark fiber transmission facilities cannot be recovered from customers in a broad geographic area. This makes scale economies especially significant.

Second, investment in dark fiber requires the commitment of large upfront sunk costs. Indeed, virtually every one of the costs associated with dark fiber deployment is unrecoverable

⁶⁷ EPN Texas Report, at 30-40; Comments of WorldCom, Inc., CC Dockets No. 01-338, 96-98, 98-147, at 19-22 (April 5, 2002) ("WorldCom Comments").

⁶⁸ WorldCom Comments, at 21 ("the extension of WorldCom's local network to an additional ILEC central office generally costs at least \$1 million").

⁶⁹ AT&T Comments, at 126; UNE Remand Order, at ¶ 357.

⁷⁰ EPN Texas Report, at 35.

⁷¹ EPN Texas Report, at 35.

⁷² EPN Texas Report, at 35.

⁷³ See Phillip E. Areeda, Herbert Hovenkamp, & John L. Solow, *Antitrust Law, An Analysis of Antitrust Principles and Their Application* Vol IIA, ¶ 44, pp. 65-66 (2d Ed. 2002) ("Areeda et al").

⁷⁴ See *id.*

once incurred. This makes investment in dark fiber much more risky than most other kinds of investment, and therefore both more costly (lenders expect higher returns when faced with greater risks) and less likely than other kinds of investment⁷⁵

Third, potential entrants into the market for dark fiber must often obtain essential inputs from third parties. The need to obtain such inputs has been recognized as an independent entry barrier in competition policy.⁷⁶ Perhaps the most important input needed from third parties is building access. EPN has found that the fees demanded by landlords to access a building can range from a few thousand dollars to a few hundred thousand dollars.⁷⁷ In some instances, property owners are demanding over \$15,000 in up front fees to enter a building and charge rates of up to \$250.00 per inch for vertical riser space and \$100.00 per inch for horizontal riser space per month.⁷⁸ The high cost of adding buildings to a network coupled with the downturn in capital markets will ensure that whatever pace of “building adds” may have existed before will be significantly curtailed.⁷⁹ As mentioned, access to rights-of-way also poses a significant entry barrier.

Even when it is possible to obtain access to buildings and rights-of-way, the process results in substantial delay (ultimately a form of cost to the prospective entrant). In EPN’s experience it typically takes four to six months to negotiate a building entrance agreement with the property owner.⁸⁰ After securing a building entrance agreement and paying the access fees, construction for even a minor fiber job generally takes more than four months to complete.⁸¹ Thus, at a minimum, it generally takes a CLEC eight to nine months to construct a spur to add a building to its network, and that is if it is able to secure the rights-of-way without much difficulty.⁸²

Fourth, potential entrants into the market for dark fiber suffer from the ILECs’ substantial first-mover advantages. That is, the ILECs have obtained access to public rights-of-way, to private buildings, and to investment capitol during the period of protected monopoly status on terms and conditions that are more favorable than can be obtained by new entrants. This fact makes it even more unlikely that there will be significant competitive deployment of dark fiber. As mentioned, ILECs generally do not face the same building access and rights-of-way obstacles faced by a potential entrant. This is because ILECs already have the facilities in place and can provide the facility in a matter of days.⁸³ As AT&T demonstrates, most customers

⁷⁵ *Id.* at 421c, pp. 67-69.

⁷⁶ *Id.* at 421e, pp.69-70.

⁷⁷ EPN Reply Comments, at 33-35, 41; EPN Texas Report, at 33, 31-33.

⁷⁸ EPN Texas Report, at 35.

⁷⁹ WorldCom Comments at 20.

⁸⁰ EPN Reply Comments, at 44-46; EPN Texas Report, at 30-31, 35.

⁸¹ EPN Reply Comments, at 44-46; EPN Texas Report, at 31.

⁸² EPN Reply Comments, at 44-46; EPN Texas Report, at 30-31, 35; see, WorldCom Comments, at 20.

⁸³ WorldCom Comments, at 20; AT&T Comments, at 147.

“do not approach CLECs until they need capacity on short notice,” thus, customers “are generally unwilling (or unable) to wait for the CLEC to complete the lengthy building process, especially since the ILEC can usually meet their needs immediately with its existing, ubiquitous network.”⁸⁴

In sum, the presence of alternative competitive facilities demonstrates that CLECs will deploy facilities when it is prudent and practical to do so.⁸⁵ However, the very substantial entry barriers to the provision of dark fiber facilities mean that the ILECs will likely face very little significant competitive entry in this market.

D. In Light Of The Entry Barriers Associated With Competitive Provision Of Dark Fiber, The Commission Should Adopt A Four Substitute Test For Impairment.

The presence of high barriers to entry in the provision of dark fiber has three important consequences for the dark fiber impairment analysis. *First*, the presence of substantial economies of scale in particular demonstrates that dark fiber is precisely the kind of network facility that should, absent evidence of multiple non-ILEC sources of supply (discussed below), be unbundled. Indeed, the Commission should establish a strong national presumption of impairment in the absence of unbundled dark fiber.

The available evidence supports the reasonableness of this conclusion. Dark fiber from non-ILEC providers is not available over most point-to-point routes and at the overwhelming majority of commercial office buildings.⁸⁶ AT&T’s data, for example, indicates that CLECs have penetrated less than 6% of commercial buildings, and for most of those buildings CLECs are able to serve only particular floors or customers.⁸⁷

EPN’s experience in Texas demonstrates that dark fiber loops are rarely available from providers other than the ILEC in the four major metropolitan areas in which it operates in Texas. Specifically, the percentage of commercial buildings where SBC has deployed fiber that are also accessible using dark fiber loop facilities from alternative providers is at best an average of 2.02% for the four large Texas metropolitan areas that were studied.⁸⁸ In smaller cities, suburban and rural areas, the percentage of buildings that can be accessed using dark fiber facilities from alternative providers is likely to be much lower because nearly all alternative fiber providers have rationally elected to focus their efforts on markets with the highest traffic density.

⁸⁴ AT&T Comments, at 147 (“even if the ILEC has to increase its capacity to serve the new customer demand, it can generally do so by adding electronics to the existing in-place facilities, without having to obtain permission from any third party or to construct additional [fiber] cables.”).

⁸⁵ AT&T Comments at 124.

⁸⁶ EPN Reply Comments, at 30-32.

⁸⁷ AT&T Comments, at 152.

⁸⁸ EPN Texas Report, at iv.

The findings of the EPN Texas Report regarding the limited number of buildings served by CLEC fiber are confirmed by the CGC Study. The CGC Study, for example, determined that in Corpus Christi, Texas, only 18 buildings were connected with CLEC fiber out of 7,390 establishments in the MSA; and in Albany, New York, only 24 buildings were connected with CLEC fiber out of 16,616 establishments in the MSA.⁸⁹ Moreover, the CGC Study also determined that in the cities examined in the Study, including Albany, Augusta, Boston, Chicago, Corpus Christi, and Portland, none of the CLECs studied in these markets offered dark fiber or wholesale fiber loops for sale or lease to other CLECs.⁹⁰

In addition, as WorldCom notes, the ability to serve a particular commercial office building does not mean that a CLEC will be able to fully meet the needs of a business customer. Most businesses will have multiple locations, and not all of them will generate the same amount of traffic.⁹¹ Thus, even if a CLEC can add one building to its network, the CLEC will still most likely have to rely on unbundled loops to serve the other locations.⁹²

ILECs have grossly overstated the amount of fiber that is available from alternate suppliers. First, the ILECs statistics contain numerous errors, for example overstating the amount of fiber that EPN plans to deploy, and the ILECs have completely ignored the impact of CLEC bankruptcies and the closure of capital markets on CLEC plans to deploy fiber. The ILECs also conveniently ignore the fact that many CLECs that have deployed fiber, such as Time Warner and AT&T, do not lease this dark fiber to other CLECs.⁹³ Contrary to the assertions of the ILECs, fiber from alternative providers, to the extent that it exists, is largely limited to inter-city long haul networks, and does not encompass the vast majority of intra-city, interoffice routes.⁹⁴ In sum, the ILECs have grossly overstated the availability of fiber from alternative sources. The fact remains that dark fiber transport and loops are rarely available from alternative providers.

Second, the presence of significant economies of scale demonstrates that the Commission cannot assume that entry by a single non-ILEC supplier will lead to entry by multiple firms. That is, even where some entry is possible, it is likely that only a single or perhaps two non-ILEC suppliers have a realistic prospect of achieving the economies of scale needed to reach profitability in their areas of chosen deployment. Thus, the Commission must only rely on actual entry into the marketplace in assessing impairment; assessing potential entry is simply too uncertain for these purposes.

⁸⁹ CGC Consulting, State of CLEC Competition, at 6-7, Table 3 July 17, 2002 ("CGC Study").

⁹⁰ CGC Study, at 7, Table 3.

⁹¹ WorldCom Comments, at 14.

⁹² WorldCom Comments, at 18.

⁹³ EPN Texas Report, at iii, 3, 12.

⁹⁴ Joint CLEC Comments, at 64-65.

Third, the presence of significant entry barriers makes it highly likely that ILECs will retain the ability to charge prices far above the competitive level even after non-ILEC suppliers have entered the market. The ILECs will only begin to lose that power when four or more substitutes have entered the relevant market. This is the logic of the Merger Guidelines used by the Department of Justice and the Federal Trade Commission to assess the lawfulness of proposed mergers. In the presence of high entry barriers, the Merger Guidelines establish a presumption of illegality for any merger that results in a Herfindahl-Hirschman Index ("HHI") (which is the sum of squares of the individual market shares of all market participants) of 1800 or above.⁹⁵ The merger guidelines assign all firms in a market equal market share for purposes of its market power analysis where all firms have, on a forward-looking basis, an equal likelihood of securing sales.⁹⁶ Assuming that all firms offering dark fiber on a particular route have an equal likelihood of securing sales (a fairly generous assumption in light of the fact that the ILECs will retain certain artificial competitive advantages), the presence of three competitors will yield an HHI of 2500, well above the cutoff for concentration levels deemed permissible by the Guidelines. It is only when four non-ILEC alternatives have entered the market that the HHI (which would be 2000) comes reasonably close to the level of market concentration deemed permissible in the Merger Guidelines. At that point, the wholesale market for the provision of dark fiber can be assumed to be workably competitive and unbundling obligations can be eliminated.

Waiting until four competitors have entered the market before eliminating the unbundling obligation is entirely justified under the 1996 Act and the *USTA v. FCC* decision. The 1996 Act was designed to spur competition, and removing the regulation of ILEC dark fiber prices where the ILEC faces three or fewer competitors would allow the ILECs and their limited competitors to set prices far above the competitive level, since oligopolistic pricing is highly likely in such circumstances (again, this is the very basis for the approach adopted by the Merger Guidelines). Such high prices would distort competition by causing competitors to purchase less dark fiber than would be the case if prices were closer to cost. Nor is it any answer to say that the competitor should be able to get around this problem by deploying its own fiber. As mentioned, the economies of scale are very substantial, and regulators cannot have any confidence that the market would support more than three non-ILEC sources of supply (although changes in technology and/or demand could change this and allow for the elimination of unbundling obligations). Consistent with the *USTA v. FCC* decision, therefore, the Commission must take such economies of scale into account to continue requiring unbundling until it is proven that the wholesale market can be workably competitive.⁹⁷

⁹⁵ See Department of Justice/Federal Trade Comm'n, 1992 Horizontal Merger Guidelines, § 1.51(b), 5 F.R. 41552 (1992) (rev. Apr. 8, 1997).

⁹⁶ See *id.* at n. 15.

⁹⁷ Furthermore, as Conversent has explained elsewhere in this proceeding, the inherent inefficiencies built into the process of obtaining dark fiber from ILECs increases the true cost to well above TELRIC. See Letter from Scott Sawyer to Marlene H. Dortch filed in CC Dkt. Nos. 01-338, 96-98, 98-147 (Oct. 9, 2002). This fact demonstrates that the "costs" in terms of consumer welfare of unbundling dark fiber are less significant than the

Based on this analysis, the following impairment test is appropriate for dark fiber. Under the test, requesting carriers would be presumed to be impaired in the absence of unbundled ILEC dark fiber. This presumption could be rebutted only where an ILEC could demonstrate to a state commission that four substitutes exist in the relevant geographic market. In such a proceeding, the state commissions would conduct a granular analysis to determine whether CLECs have four robust market substitutes for ILEC dark fiber along a specific route (*e.g.*, the inquiry must examine whether there are actual viable alternatives to ILEC dark fiber between two identified points in the network, such as between two specific ILEC wire centers, or between one ILEC wire center and a specific customer premises). To qualify as a substitute, a non-ILEC source of supply must be deemed financially stable by the state commission. The state commission would not be permitted to consider the existence of alternative sources of lit service along that same route in its evaluation of alternative sources of dark fiber, because (as explained above) lit service is not an adequate substitute for dark fiber. Moreover, a state could not assume that a wholesaler of lit transport in the relevant geographic market would also offer dark fiber. Providers of lit transport simply cannot offer dark fiber in many circumstances. For example, where a lit provider has deployed a ring architecture, it cannot sell a segment of one of its fiber strands for purchase along a particular point-to-point route without rendering useless the rest of the fiber strand around the ring. This is obviously an inefficient use of facilities, and a non-ILEC supplier would never be able to make fiber available in these circumstances for anything close to a competitive price.

States would conduct the granular analysis proceedings upon petition by ILECs. The filing of an ILEC petition would not relieve the ILEC of its obligation to continue to provide existing and new dark fiber UNEs during the pendency of the proceeding. States would be free to structure the granular analysis proceedings in a manner they deem efficient, for example, by creating filing windows during which ILEC petitions could be filed and determining the length of time before subsequent windows would open. The Commission should establish a national rule that, at a minimum, ILECs may not initiate a granular analysis proceeding at a state commission for a given route within two years of a state commission's order regarding the ILEC's previous petition for that route.

Any determination by a state that a UNE should be withdrawn must be accompanied by a transition period of no less than thirty-six months or the remaining term of existing interconnection agreements (including any agreements in the section 252 arbitration and approval process at the time of the determination), whichever is longer, during which existing UNEs on existing routes must be maintained. Further, at the end of the transition period CLECs must be entitled to purchase the UNE as a service from the ILEC at a non-TELRIC rate to be determined by the state commission. In the case of dark fiber transmission facilities, that rate should not exceed the price of any dark fiber alternatives along the subject route or routes at the time of the determination.

D.C. Circuit assumed in *USTA v. FCC*, thus justifying retention of the unbundling obligation until the market for dark fiber is workably competitive. *See id.* at 1, 3.

In addition, when a state commission determines that a specific dark fiber route fails the impairment test and a CLEC chooses to move its traffic off the UNE, the ILEC shall be obligated to ensure that the traffic is migrated without any adverse impact on end user service. Alternatively, if a CLEC chooses to continue using the ILEC dark fiber at a non-TELRIC rate following the end of a UNE's availability on a specific route, the ILEC is prohibited from imposing any "conversion" conditions or charges, or objecting to any combination of UNEs and tariffed services entailed by the CLEC's choice.

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October 4, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
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Notice of Ex Parte Meetings
CC Docket Nos. 01-338, 96-98, 98-147

EX PARTE OR LATE FILED

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on October 3, 2002, Pantios Manias, Senior Vice President for Carrier Relations, Regulatory and Business Development, and Stephen Crawford, General Counsel, of El Paso Global Networks ("EPGN"); Jonathan Lee of the Competitive Telecommunications Association; and the undersigned met with Christopher Libertelli, in the office of Chairman Powell, to discuss regulatory issues relating to the above-referenced dockets.

EPGN discussed its concerns in the Commission's triennial review proceeding and discussed some of the highlights of its comments and reply comments that filed in these proceedings. In particular, EPGN stressed the importance to its business operations in Texas of continued access to dark fiber unbundled network elements ("UNEs") and high-capacity loop and transport UNEs. EPGN expressed the view that requesting carriers in the markets EPGN serves would be impaired if competitors did not have access to dark fiber UNEs, because comparable facilities are not available as a practical matter from third parties, and self-provisioning in most cases is uneconomical due to the cost characteristics of deploying dark fiber.

EPGN pointed out that it has invested over \$500 million to construct telecommunications facilities in Texas, including deploying equipment to light fiber UNEs, and in deploying its own fiber facilities where doing so is economically efficient. EPGN stressed that for its markets in Texas the overwhelming majority of the demand is for service to locations that it can only reach using the dark fiber it obtains from SBC.

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Marlene H. Dortch

October 4, 2002

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EPGN further noted that it would be economically infeasible to extend fiber facilities to most of its prospective customers due to the expense and delay inherent in constructing duplicative facilities (including, for example, the need to negotiate access to buildings and construct lateral facilities that duplicate the incumbent LEC's existing building entrance facilities).

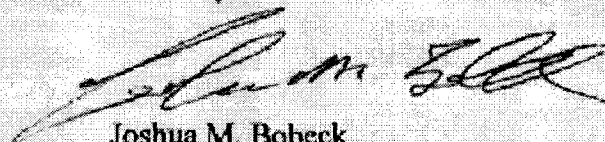
Even in those instances where EPGN uses SBC dark fiber, EPGN stressed that the vast majority of its costs are for purchasing, engineering and deploying the equipment to light the fiber (i.e. Dense Wave Division Multiplexers ("DWDM") and/or Add/Drop SONET Multiplexers), as opposed the initial nonrecurring charges for obtaining the UNE dark fiber or the monthly charges for using that UNE dark fiber. Thus EPGN is of the view that dark fiber is the UNE that is closest to 100% facilities based competition because the only element the ILEC provides is the unlit fiber, which is and always will be the most difficult and uneconomical piece of the network for competitors to duplicate.

EPGN also outlined difficulties it has experienced in obtaining parity access to dark fiber and other UNEs from SBC in Texas, and urged the Commission to strengthen its UNE rules to protect the availability of network elements on reasonable terms and on parity with the access available to the incumbent LECs, and discussed the Arbitration Award by the Texas Public Utilities Commission that addressed many of these issues.

EPGN provided the participants in the meeting with duplicate copies of the comments it has filed in these proceedings as well as other materials. These other materials, included with this letter, are a PowerPoint presentation and other documents EPGN used in its presentation.

Therefore, in keeping consistent with the Commission's rules, EPGN is filing an original and one copy with the Office of the Secretary.

Sincerely,



Joshua M. Bobeck

Attorney for El Paso Global Networks

Enclosures

cc: Christopher Libertelli
Pete Manias
Stephen Crawford
Jonathan Lee

Caution, Competition Ahead

By James K. Glassman 9/23/02

09/23/2002

Just when nearly everyone had given up hope of breaking the monopoly in local telephone service, competition has suddenly blossomed, and consumers and small businesses around the country are beneficiaries.

The plan set by Congress in a law enacted six years ago is at last working. More Americans are choosing companies other than the Bells, the longtime monopolies, as their local carriers, and, as a result of the new competition, prices are falling and quality rising.

The Bush Administration, which earlier seemed to be toying with the idea of giving up on competition - both in local service and in high-speed Internet access, or broadband - now has a success on its hands. So do members of Congress of both parties going into the mid-term elections. After all, there's nothing elected officials like to brag about more than policies that save money for consumers. And with telecom, they deserve bragging rights.

But the game isn't over. The chairman of the Federal Communications Commission, Michael Powell, has some important decisions to make, and at least one of the giant Bell companies is trying to use its clout to halt the progress. But, as Business Week put it, "If Powell abandons the approach of the 1996 law and gives the Bells the rules they want, he may well cut off competition just as it's getting good."

How good? By the end of June, thanks to a process called UNE-P, the Bell's competitors had signed up customers for 7.7 million telephone lines, a gain of 33 percent, in just six months. Just two and a half years ago, the competitors had fewer than a half-million lines.

UNE-P stands for "unbundled network element platform." It's telecom gobbledygook, but it's vital. The Telecommunications Act of 1996, passed overwhelmingly by both parties, allowed competitors, paying a reasonable price, to use UNE-P to hook up to the local Bell network. That network, of course, was built over a century by the original nationwide monopoly, American Telephone & Telegraph Co., with the help of government subsidies and protection. AT&T managed the lines in a kind of public trust.

With the AT&T breakup two decades ago, the local system was bequeathed to seven regional Bell monopolies (now, through mergers, just four) while AT&T went into the long-distance business.

Long distance was opened up to competition, with companies like MCI and Sprint getting their start by leasing AT&T's long-distance lines, then, after gaining a foothold, building their own facilities. The result was higher quality and lower prices - down 40 percent since 1992 alone, according to the FCC. The 1996 law applied the same leasing model - in this case called UNE-P - to local service, in hopes of gaining similar benefits from competition.

But, until lately, local competition hasn't happened - mainly because of lawsuits and foot-dragging by the Bells - and, as you would expect in a monopoly market, rates have risen and service deteriorated. Now, much of the underbrush has been cleared, and state public utility commissions are paving the highway to competition by setting sensible UNE-P prices.

Michigan led the way more than a year ago, and Illinois, New York, Indiana, New Jersey, California and Ohio have followed. The Bells' competitors have responded by offering service in these states and several others with hopeful prospects, and the Bells have countered,

scrambling to retain customers by cutting prices and boosting services.

The process is no mystery. It's called free-market competition, and it's at the heart of the economy philosophy of the Bush Administration - and of most members of Congress.

Here's a concrete example: In June, the Grand Rapids (Mich.) Press reported, "Pushed by a growing number of competitors, SBC Ameritech, the state's dominant local-phone provider, cut the price of its basic local-call plan by one-third and lifted the limits on local and toll calls in other plans." Savings for Michigan consumers: \$26 million. In 1999, competitors had only 4 percent of Michigan's local lines. Today, they have about 15 percent.

Comments by executives from Verizon, Qwest and BellSouth indicate they can live with UNE-P. CEO Ivan Seidenberg, for instance, "assured investors that UNE-P wouldn't hurt Verizon's finances right now," according to *Communications Daily* on Sept. 10.

After all, as UNE-P lets competitors enter local service, the law (under Section 271) allows the Bells to get into long distance, which so far has provided the Bells with more than they have lost on the local side. In a recent report, Lehman Brothers noted, "BellSouth emphasized that their success in entering the long-distance market through the 271 approval process offer a considerable advantage over the UNE providers." BellSouth, by offering a bundle of local and long-distance services, believes it has an appealing package to sell customers, which "will obviate the need for a major change in UNE regulations."

But SBC Communications, which seems to have dropped the ball on developing the competitive local-plus-long-distance packages that BellSouth talks about, is screaming bloody murder and making extravagant claims about the damage UNE-P is doing.

Thanks to the mandated rates, complained Edward Whitacre, SBC's chairman, his company's financial situation is "a downward spiral" that "will lead to the ultimate demise of our network." But that's nonsense. Certainly, life is a lot easier when you're a monopoly, but recent reports by investment firms show that SBC - which is the regional Bell for the Midwest, West and Southwest and has investments in 25 phone companies internationally, from South Africa to Uruguay - is alive and well.

Among the top 30 companies listed in Fortune's annual survey, SBC was number-one in profit margin, earning 16 cents on every dollar in sales. The average company in the Fortune 30 earned less than 5 cents on the dollar.

In a recent presentation to stock analysts, Whitacre bragged about SBC's rising wireline profit margins - most recently 42 percent. In fact, all of the Bells have excellent prospects. As Value Line analyst David Reimer put it, Bell "stocks should be able to break out of their current funk, given the companies' significant market scale and ability to further pursue the more promising of growth avenues." Value Line, as of its latest report (July), rated SBC "A-plus" for "financial strength" and calculated SBC's return on capital at a hefty 17 percent, compared with an average of 4 percent for the industry.

Lehman Brothers told clients last month that the Bells are "expected to deliver strong free cash flow growth over the next five years" and rated SBC "outperform" (that is, expected to do better than the market as a whole). Of 23 analysts surveyed by Yahoo, 12 rate SBC a "strong buy" or "buy" and none rates it a "sell."

Value Line estimates that SBC's earnings will continue to rise this year to \$2.45 a share - that's up from just 86 cents in 1986. SBC's cash flow is a whopping \$18 billion, according to Value Line - considerably higher than that of giants like Microsoft, Wal-Mart and General Motors.

The objective of Whitacre and William Daley, the former chairman of Al Gore's presidential

campaign who is now SBC's president, is to get Congress or the FCC to pre-empt the states and jack up the rates that consumers pay. According to the Detroit Free Press, SBC is trying to frighten Michigan policymakers into raising rates by using one of the oldest tricks in the corporate playbook: threatening that the company will have to lay off some of its 16,000 employees in the state.

Again, that's nonsense. If SBC loses business to competitors, it might have to lay off workers. But, meanwhile, those same competitors will be hiring workers - perhaps the same people. In fact, if local service grows as competitive as long distance, then the total pie - that is, the amount of local business in general - will expand, and, overall, jobs should increase.

It is true, however, that SBC - and the other Bells - have a real fight on their hands. That's what competition is all about. And that's great for consumers. In July, SBC's Illinois subsidiary announced a major rate cut, and in August, SBC's Ohio subsidiary introduced "significant cost savings [for] approximately 96,000 small businesses."

AT&T, one of the Bells' new competitors on the local scene, expects to offer service to half of the Bells' residential customers by the end of this year, entering states like California and New Jersey. In New York, where Verizon was once a rock-solid monopolist, AT&T offers unlimited local calling for \$19.95 a month. Consumer Reports quoted a study finding that, thanks to the new competition, consumers in the state reduced their bills by nearly \$13 a month.

Judging from these results, Business Week is right to warn that changing to "a regulatory scheme that ensures rich profits for the Bells alone is likely to hit consumers in the wallet - and slow innovation even more."

The Bells have traditionally focused their attention on lobbying and lawyering rather than on innovation and customer service. Competition is a new and scary development for them, and their aim over the past six years has been to kill it off - not by offering cheaper and better products but by persuading politicians and filing lawsuits.

Lately, the Bells' arguments are growing threadbare. For example, they claim that UNE-P is only "synthetic competition." But the Bells currently provide long distance service to customers by leasing lines from incumbents in precisely the same process. Discounts to the Bells from companies like Sprint and AT&T range from 55 percent to 70 percent. (In fact, some securities analysis encourage the Bells to embrace the idea of leasing out their local lines as a source of extra income, rather than reflexively opposing the idea as a threat.)

In time, competitors plan to build their own local networks, thus developing what is called "facilities-based" competition. But, according to a recent report by the investment firm Stephens, Inc., "the FCC is likely to keep the current system, thus allowing CLECs [that is, the Bell competitors] to accumulate a customer base large enough so that competition can truly take hold. The 'build it and they will come' facilities-based approach has obviously not worked as well as planned. We believe the FCC will recognize this failure and allow the UNE-P CLECs to build enough scale so that a gradual transition to a facilities-based network can be done."

Let's hope so. Chairman Powell has a momentous decision to make. He has been wise to postpone action until he could see the lay of the telecom landscape. Thanks to actions on UNE-P by the states - with Massachusetts, Pennsylvania, Minnesota, Maryland and many others expected to follow leaders like New York and Michigan - competition is working at the local level.

But eternal vigilance is the price of telecom freedom. Some lawmakers on the Hill could try to insert language in appropriations bills that would gut the work of states that are setting wise UNE-P rates. The Bush Administration, which stands to benefit from this consumer-telecom success, must throttle any of these attempts, and it would be a disaster if Michael Powell, the

son of the Secretary of State, were to panic and overturn a major policy achievement for the White House.

In the end, it appears the Bells are going to have to compete - in long distance, broadband and local service - whether they like it or not. The winners in telecommunications will be entrepreneurs and innovators, not monopolists. Of course, the biggest winners of all are America's consumers and small business owners, who, in these tough economic times, are starting to enjoy the benefits of lower telecom rates and better services -- just as the advocates of competition in the Administration and Congress have been saying all along.

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DARK FIBER: TEXAS SEES THE LIGHT

El Paso Networks LLC ("EPN") recently arbitrated the terms and conditions for its unbundled access to SBC's dark fiber in Texas with SBC's ILEC affiliate SWBT. In that proceeding, the arbitrators rejected SBC's attempts to curtail the availability of dark fiber, to restrict how UNE dark fiber could be used, to conceal information regarding dark fiber deployment, and to impose onerous restrictions on when dark fiber would be deemed available. These decisions are important considerations for the FCC as it considers arguments from the RBOCs suggesting that CLECs are no longer impaired without access to dark fiber. The evidence from Texas clearly shows that impairment remains. Further, the EPN Award reveals that SBC, by restricting access to dark fiber, has stifled the growth of competition over the last three years. Now that competition is beginning to take root it is critical that the FCC allow it to grow as envisioned by Congress when it passed the 1996 Act.

SUMMARY OF SIGNIFICANT POINTS TAKEN FROM TEXAS PUC REVISED AWARD IN THE ARBITRATION BETWEEN EPN AND SBC

- **CLECs in Texas are Impaired Without Unbundled Access to Dark Fiber**
- **Nondiscriminatory Access to UNE Dark Fiber Includes Access to Unspliced or Unterminated Fiber and the ILEC Must Splice or Terminate that Fiber for the CLEC ILECs Must Provide Access to All Loops**
- **CLECs May Access ILEC Dark Fiber at Existing Splice Cases**
- **Splicing or Terminating a Dark Fiber does not Constitute 'Construction' of a Network Element**
- **Access to UNEs is Meaningless Without Parity Access to Information Regarding the Location of Such UNEs**
- **Use Restrictions on UNE Dark Fiber are Unwarranted**

CLECs in Texas are Impaired Without Unbundled Access to Dark Fiber

The Arbitrators refuted SBC claims that EPN's proposals for access to UNE dark fiber to provide wholesale services violated the policies and intent of the 1996 Act. SBC had argued that the Special Access market was mature and competitive and thus CLECs such as EPN were not impaired without access to SBC dark fiber to serve that market. SBC contended that the market had changed since the Texas PUC issued its Waller Creek Award in 1999, but the PUC disagreed and upheld EPN's ability to use UNEs including dark fiber to provide wholesale services to other telecommunications carriers. The PUC's 1999 Waller Creek Award made important determinations, based on testimony and other evidence, that competition would benefit if CLECs could use UNEs including dark fiber to provide wholesale telecommunications services to other telecommunications carriers.

The 1999 Waller Creek Reconsideration Order stated that CLECs could use dark fiber and other UNEs to provide telecommunications service to other telecommunications carriers including IXCs that were not serving the end user, because otherwise EPN would be "precluded from offering what may be a valuable and competition-enhancing service." Docket 17922 & Docket 20268, *Order On Reconsideration Of Second Order On Appeal Of Order Nos. 9 And 2*, Tex. PUC, June 1999 at 10.

Revised Arbitration Award at 23-24 (footnotes omitted):

"The Arbitrators find that the issue of whether EPN can use UNEs in combination with its own facilities to provide wholesale services was decided by the Commission in the Waller Creek Arbitration. In Waller Creek, the Commission specifically concluded that Waller Creek "can use UNE dark fiber (or other UNEs) to carry traffic for any other telecommunications provider regardless of who is serving the retail, local end use customer." The Arbitrators find that SWBT has not provided sufficient argument or evidence to justify a finding contrary to the Commission's holding in Waller Creek. Therefore, the Arbitrators find that EPN may continue to purchase UNEs and use them, alone or in combination with their own facilities, to provide wholesale services to other providers."

EPN provided evidence that without access to unspliced dark fiber, EPN would be impaired in its ability to provide service. Between 1999 and 2002 almost 60% percent of all EPN orders for dark fiber loops required splicing. Absent SWBT's obligation to splice, EPN would have been unable to serve those customers. The Arbitrators rejected SBC's rationale for denying EPN access to unspliced or unterminated dark fiber. The Arbitrators reached a similar conclusion regarding unterminated dark fiber.

Revised Arbitration Award at p. 139-140 (footnote omitted):

With regard to instances where UNE dark fiber is deployed as part of SWBT's network, but not spliced end-to-end, the Arbitrators find that SWBT has an obligation to provide that unspliced UNE dark fiber to EPN and splice it upon request; however, EPN must pay SWBT all TELRIC costs associated with such splicing activities for the requested route. The Arbitrators believe that EPN would suffer if SWBT chose to provide only that UNE dark fiber which is completely spliced from the central office to the customer premises.

Revised Award at 133

Further, the Arbitrators clarify that the UNE dark fiber that SWBT is obligated to provide to EPN does not necessarily need to be terminated at both ends of the route. The Arbitrators believe that EPN would be harmed if SWBT chose to provide only that UNE dark fiber which is terminated at both ends of the route. SWBT certainly has the right to deploy its dark fiber in a manner consistent with its network deployment policies, but the Arbitrators do not believe that SWBT's business decisions should limit EPN's ability to obtain UNE dark fiber from SWBT. EPN offered evidence that it was impaired without access to dark fiber. EPN further noted that both EPN and SBC use fiber to build rings to serve its customers and these rings must have two completely diverse paths. SBC argued that only the fiber between the customer and the SBC Serving Wire Center for that customer should be available as a UNE. The Arbitrators rejected SBC's arguments and found that that SBC's fiber between a customer location and a SBC central office other than the customer's serving central office was UNE Dark fiber. The Arbitrators recognized that EPN would be impaired without unbundled access to this fiber, and declined to accept SBC's tortured explanation for denying EPN access to this fiber.

Revised Award at 133 (footnotes omitted)

SWBT argued that the Commission's CoServ Arbitration Award only applies to dark fiber SWBT deems as the primary route. The Arbitrators disagree. In the CoServ Arbitration Award, the Commission clarified the definition of dark fiber to aide in the equitable access to UNE dark fiber. In any instance where dark fiber exists from a wire center to the closest available dark fiber UNE within a proximity of a customer premise, the Arbitrators find that SWBT is obligated to provide that UNE dark fiber to EPN or any requesting CLEC, consistent with the 25% spare fiber rule. The Arbitrators also find that SWBT is obligated to provide UNE dark fiber to EPN, where technically feasible, when the route involves more than one central office. The Arbitrators do not believe this requirement would pose any harm to SWBT given the fact that SWBT is protected by the dark fiber revocation provisions contained in the ICA.

**Nondiscriminatory Access to UNE Dark Fiber Includes
Access to Unspliced or Unterminated Fiber and the ILEC
Must Splice or Terminate that Fiber for the CLEC**

The Arbitrators rejected SBC's argument that unspliced or unterminated fiber is not available as a UNE. The Arbitrators required SBC to make such fiber available and splice and terminate such fiber upon EPN's request because SBC performs that identical function for itself on a regular basis.

Revised Award at 133 (footnotes omitted).

Further, the Arbitrators clarify that the UNE dark fiber that SWBT is obligated to provide to EPN does not necessarily need to be terminated at both ends of the route. The Arbitrators believe that EPN would be harmed if SWBT chose to provide only that UNE dark fiber which is terminated at both ends of the route. SWBT certainly has the right to deploy its dark fiber in a manner consistent with its network deployment policies, but the Arbitrators do not believe that SWBT's business decisions should limit EPN's ability to obtain UNE dark fiber from SWBT.

Revised Award at 133-134 (footnotes omitted)

SWBT argued that if it were required to build, splice or rearrange facilities at the request of EPN, capacity would be stranded, service to customers would be delayed, and SWBT's ability to meet its carrier of last resort obligations would be impaired. The Arbitrators disagree and find that SWBT provided no convincing evidence supporting its claims that service to customers would be delayed and its ability to meet its carrier of last resort obligations would be impaired. Additionally, the Arbitrators again rely on the 25% spare fiber rule which essentially precludes the possibility of stranded capacity of dark fiber.

The Arbitrators find that EPN is similarly not asking SWBT to construct additional facilities. EPN is only asking for access to fiber that is already there. The Arbitrators agree with EPN that termination does not require deployment of any new capital facilities or new construction. The Arbitrators do believe, however, that termination involves field work which SWBT already does on a daily basis. Therefore, the Arbitrators find no harm in requiring SWBT to terminate dark fiber for those facilities that are already in existence.

CLECs May Access ILEC Dark Fiber at Existing Splice Cases

EPN asked that the arbitrators require SBC to splice EPN fiber to SBC fiber at existing splice points upon EPN's request. This allows EPN to access SBC backbone fiber and build its own lateral to serve a customer where SBC has no fiber to that customer or has exhausted all capacity. In such circumstances the economics may justify EPN building the lateral from the SBC backbone to the customer but would not justify duplication of SBC's exiting backbone facility. The Arbitrators agreed with EPN and rejected SBC's position.

Revised Award at p. 162 (footnotes omitted)

The Arbitrators find that SWBT has not supported its argument that the access that EPN requests is not technically feasible. It appears to the Arbitrators that SWBT has artificially extended EPN's request to mean that EPN is seeking access to points in the network that could possible cause undue harm to SWBT and CLECs alike. The Arbitrators do not read EPN's request to mean that it seeks access at any point. The Arbitrators find that EPN is seeking the ability to have its own fiber spliced by SWBT technicians to SWBT dark fiber UNEs at existing

splice cases and termination points. SWBT argued that dark fiber cannot be accessed at a splice case because splice cases are inaccessible points in SWBT's network. However, the Arbitrators find insufficient persuasive evidence from SWBT demonstrating how or why splice cases are inaccessible points and that access to these points is technically infeasible.

Splicing or Terminating a Dark Fiber does not Constitute 'Construction' of a Network Element

The ILECs contend that the Act does not require them to construct new UNEs for CLECs use. The ILECs also use that narrow limitation on their unbundling obligation to deny CLECs meaningful access to UNEs in manner that actually permits the CLEC to use the element to serve customers. In the EPN arbitration the Texas PUC rejected SBC's argument that splicing and terminating dark fiber was construction of a new element.

Revised Award at 133 (footnotes omitted)

SWBT argued that it should not be required to construct dark fiber for use as a UNE. The Arbitrators do not believe that obligating SWBT to provide UNE dark fiber as described above would require SWBT to construct dark fiber for EPN for use as a UNE. In the CoServ Arbitration Award, the Arbitrators found that terminating dark fiber does not constitute constructing new transport facilities. Additionally, the Arbitrators also found that CoServ was not asking for SWBT to construct additional facilities; CoServ was only asking for access to dark fiber in those facilities that SWBT has already deployed.

Revised Award at 133 (footnotes omitted)

The Arbitrators find that EPN is similarly not asking SWBT to construct additional facilities. EPN is only asking for access to fiber that is already there. The Arbitrators agree with EPN that termination does not require deployment of any new capital facilities or new construction. The Arbitrators do believe, however, that termination involves field work which SWBT already does on a daily basis. Therefore, the Arbitrators find no harm in requiring SWBT to terminate dark fiber for those facilities that are already in existence.

Access to UNEs is Meaningless Without Parity Access to Information Regarding the Location of Such UNEs

Under the parties existing agreement EPN has the ability to view SBC's physical maps that show the location of SBC's fiber network. Despite this ability SBC continually skews the ordering process forcing EPN to submit a series of multiple queries, each for a \$250 fee in order to determine whether fiber is available. EPN asked the Commission to clarify that SBC's responses to EPN provide EPN with all available information regarding the specific customer location rather than requiring EPN to submit a series of such request and play hide and seek to get UNE

dark fiber. In addition, the arbitrators rejected SBC's position that it could hide from CLECs the location of its fiber under the guise of proprietary information or national security.

Revised Award at 40-41 (footnotes omitted)

The record reflects that SWBT has the capability of providing detailed information in response to a request for facilities to be used at a particular location. Prior to November 2001, SWBT provided EPN with a spreadsheet with the information regarding all the facilities in an area in response to EPN facility checks. SWBT would tell EPN "We don't have fiber in this building, but we have fiber in these other buildings." The record further reflects that SWBT provides this level of service to itself or its retail personnel. EPN's witness Galvan testified as to SWBT's facility check practice. Mr. Galvan testified that SWBT OSP engineers develop a knowledge of facilities in their assigned areas, including planned and work in progress, utilizing all resources to verify facilities. Therefore, the Arbitrators find that in response to an EPN facility check request, SWBT's engineers will detail any and all facilities in or near the building that can be used for possible service to the customer. The Arbitrators further clarify that the finding herein requires SWBT to provide EPN with information regarding such facilities, even when that information may be solely available due to the knowledge of the SWBT OSP Engineer(s).

In the case of facilities within a multi-tenant building, if fiber does not exist to the floor specified by EPN, but is available elsewhere in the building, SWBT will indicate where in the building facilities are available rather than responding that there are no facilities available.

The Arbitrators are not persuaded by SWBT's arguments and evidence regarding SWBT's assertion that it should not be required to provide network information for security and proprietary marketing concerns. SWBT argued that to release all fiber demarcation locations in a building discloses customer proprietary information (CPNI), but SWBT does not explain adequately how it makes the leap from network/facility information to CPNI. EPN is attempting to buy unbundled fiber and cannot reasonably do so without knowledge of where such fiber exists. The Arbitrators find a distinction between facility information and proprietary customer information. EPN is neither asking for, nor receiving, SWBT marketing information, but is granted the requisite unbundled facility information. The Arbitrators find unconvincing SWBT's explanation regarding security concerns over the release of facility routing information. SWBT very simplistically stated that "if a person knows where that cable is, they can certainly access it. They can cut communications to hospitals, to police stations, to - you know, cut your 911 service very easily if they know that route and path." Although security is a valid concern, the Arbitrators do not find that it justifies restricting CLEC access to network information under these circumstances. The Arbitrators find that SWBT may require CLECs to provide evidence that the CLEC has instituted an appropriate process for security clearance for the CLEC's personnel that handle information related to SWBT's cable routing.

Revised Award at Page 75

The Arbitrators also contemplate the scenario where an EPN engineer may require the assistance of a SWBT engineer to gain access to a part of SWBT's network design. In this scenario, the Arbitrators do not consider this type of assistance to be of the "engineering" variety. SWBT certainly is within its own right to restrict access to its network; however, EPN must be allowed an equitable opportunity to do its own engineering work given the fact that SWBT is not contractually obligated to provide engineering assistance to EPN. Therefore, the Arbitrators also find that SWBT must allow EPN engineers equitable access to SWBT's network information in lieu of being contractually obligated to providing engineering assistance to EPN.

ILECs Must Provide Access to All Loops

SBC refuses to provide EPN unbundled access to loop facilities unless those facilities connect the customer to the customer's SBC-designated serving wire center. SBC coined the phrase "Route Other Than Normal" or "ROTN") to describe such loops. SBC claims that such facilities are not unbundled loops. SBC will however allow EPN to access such loops if it also obtains a loop between the customer and the SWC. Further, SBC refuses to splice dark fiber on such loops even while it splices dark fiber on loops between the customer and the SWC. The arbitrator rejected SBC's attempt to create a distinction among loops based on SBC's designation of the wire center, and rejected the SBC coined phrase of ROTN.

Revised Award at 36 (footnotes omitted)

The record reflects that there are instances in SWBT's own network where SWBT, for its own purposes, has deployed fiber facilities between a customer premise and a wire center other than that customer's pre-defined, geographic wire center. To the extent SWBT has facilities that route from a local central office to a customer's premises, this facility is therefore by definition, a loop. SWBT's concept of route other than normal (ROTN), is therefore irrelevant in the determination of whether a facility is a loop.

Use Restrictions on UNE Dark Fiber are Unwarranted

Since 1999 SBC has sought to impose onerous use conditions on CLEC use of dark fiber, claiming that CLECs cannot use dark fiber to provide wholesale service to other telecommunications carriers. As discussed above the Texas PUC rejected this contention in 1999 and affirmed that ruling in the EPN Award.

TELRIC PRICES: MYTH & REALITY

WHAT IS A TELRIC PRICE?

A TELRIC price compensates RBOCs when they are required to lease their facilities to competitors. TELRIC prices are set every three to five years in negotiations and, if those fail, by regulators.

TELRIC prices assume that leased facilities are 100% brand new -- even though the RBOCs actually run a network that is mostly decades old and has been paid for by ratepayers.

WHY IS A TELRIC PRICE THE RIGHT PRICE?

A TELRIC price is the right price because it:

- Promotes facilities-based competition where new entrants can build facilities cheaper than the RBOCs.
- Prevents inefficient duplication of networks.
- Compensates RBOCs for use of their facilities at prices -- set, however, by regulators -- consistent with prices in competitive markets.
- Protects RBOCs against getting stuck with excessive amounts of underutilized facilities.
- Provides a predictable and consistent standard necessary for planning by both RBOCs and CLECs.

IS A TELRIC PRICE LEGAL?

Yes. The U.S. Supreme Court just recently -- May 13, 2002 -- confirmed that the Federal Telecommunications Act of 1996 gives the FCC the authority to require that state commissions set TELRIC prices for elements the RBOCs lease to CLECs.

WHY NOT LEAVE LEASE PRICES UP TO THE MARKETPLACE?

Bad idea. The RBOCs do not want to lease to competitors. Given that the RBOCs control the bottleneck networks to which CLECs need access, RBOCs would *raise lease prices* for their facilities so high that CLECs could not afford them. This would kill any prospect of local competition.

TELRIC PRICES: MYTH & REALITY (Cont'd)

MYTH: COMPETITORS ARE GETTING FACILITIES ON THE CHEAP

REALITY: NOT TRUE

Much of the RBOCs' networks is decades old and often has largely been paid for by ratepayers. Yet, TELRIC prices assume that facilities are 100% new and have never been paid for. This is a good deal for the RBOCs. In fact, TELRIC prices are often higher than the RBOCs' "real" costs and are a windfall for the RBOCs -- though the RBOCs will never admit this in public!

Examples of when RBOCs earn windfall revenues:

- **RBOCs' empty central office spaces find a new purpose and earn RBOCs hundreds of millions of dollars in revenue.**

RBOCs had many empty spaces (basements, floor space, closets) in their central offices. These spaces became empty in the 1980's and 1990's as newer central office equipment and switches became much smaller and replaced bulky older ones. Those spaces gathered dust, were used for storage or as overflow for administrative tasks. After the Act of 1996, many of those empty spaces have been leased out to CLECs and earn RBOCs unexpectedly *hundreds of millions of dollars*.

- **RBOCs' local loops are mostly decades-old copper cables that have in good part been paid for by ratepayers -- CLECs are paying TELRIC prices as if they were receiving brand new state-of-the-art facilities.**

At least 80% of the RBOCs local loops are copper cables that were placed decades ago (many may be 40 or more years old.) *Those older loops have often already been paid for by ratepayers.* When CLECs lease loops from RBOCs, they are almost always those old copper loops. Yet, CLECs have agreed to pay lease prices as if they were getting newly placed, state-of-the-art facilities. The difference between the new price and cost of old or paid-for facilities is a windfall to the RBOCs.

TELRIC PRICES: MYTH & REALITY (Cont'd)

MYTH: TELRIC DOES NOT INCLUDE ENOUGH PROFIT

REALITY: NOT TRUE

TELRIC prices provide RBOCs a "reasonable" profit on facilities leased to CLECs. In fact, this is a requirement under the ACT of 1996 (Section 251) -- it's the law!

But better yet, under TELRIC prices, RBOCs are *guaranteed* a profit. Now these days most business would die for such a guarantee. Surely, there is no federal law that guarantees CLECs a profit.

MYTH: TELRIC DISCOURAGES FACILITIES-BASED DEPLOYMENT

REALITY: NOT TRUE

CLECs have attracted large sums of money from investors and have invested over \$55 billion in their networks since the ACT of 1996. The argument that TELRIC discourages investments is simply not credible. It was also rejected by the U.S. Supreme Court:

"A regulatory scheme that can boast such substantial competitive capital spending [\$55 billion] in four years is not easily described as an unreasonable way to promote competitive investment in facilities."

MYTH: ALTERNATIVE FACILITIES ARE AVAILABLE SO THERE IS NO NEED FOR REGULATORS TO SET TELRIC PRICES FOR LEASED FACILITIES

REALITY: NOT TRUE

There are no alternatives to the RBOCs' facilities for CLECs that want to serve broad segments of local markets. If there were, prices would surely drop below TELRIC and the expensive and cumbersome regulatory and legal battles would stop. CLECs would simply buy from companies other than RBOCs.

COMMENTARY

By Catherine Yang

THE DECISION THAT COULD RESHAPE TELECOM

With 500,000 jobs and \$2 trillion in market valuation lost in the telecom bust, it's natural that the hunt for scapegoats is nearly as fierce as the search for solutions. That's why Federal Communications Commission Chairman Michael K. Powell is under rising pressure to move fast. Indeed, Powell is close to acting on the agenda he sketched when he took the job last year. His idea is to cut back regulations by the end of the year on established local phone companies, mainly the former Bells. This could give them a clearer path to profits, he says, and spur a much-needed investment binge. To Capitol Hill Republicans worried about midterm elections, delay could cost votes back home. "I consider him a close friend, but deregulation can't wait," says House Commerce Committee Chairman W.J. "Billy" Tauzin (R-La.).

But speed is no substitute for smarts. The problem with the much-maligned Telecom Act of 1996 may well be that it hasn't really been given a chance—until this year. The Act called for the Bells to lease their lines to rivals, creating competition in local markets. In exchange they could sell long-distance service. The idea: accept short-term regulation to make much broader deregulation possible.

For years, though, the Bells protected the status quo through regulatory and legal roadblocks. But now that AT&T and other rivals have finally found a way to compete with the Bells, the results are promising. If Powell abandons the approach of the 1996 law and gives the Bells the rules they want, he may well cut off competition just as it's getting good.

Why are the outsiders winning? From California to New York, state regulators are finally applying the 1996 Act more aggressively. Increasingly, challengers can lease Bell lines

at a low enough rate to provide service and make money. Over the past two years, AT&T has introduced local service in eight states, serving 1.5 million customers. And rates are coming down. In Michigan, incumbent Bell snc Communications Inc. has shaved local rates 33% since February, when AT&T plowed into the market. AT&T is racing to extend this service nationally, with an eye to building its own network within four years. "Hopefully, the FCC won't

planned spending to upgrade its broadband network this year because of network-sharing rules. And Powell, who declined to comment, is correct that competition will eventually come from wireless companies and satellite-based service providers.

For now, however, Powell's plans threaten to create oligopolies. In local markets, the Bells would again reign supreme. In broadband, the Bells, with their digital-subscriber-line services, would likely divvy up the market with cable companies. "What Powell calls deregulation, I call remonopolization," says H. Russell Frisby Jr., president of the Competitive Telecommunications Assn., a group of Bell rivals.

Sadly, a regulatory scheme that ensures rich profits for the Bells alone is likely to hit consumers in the wallet—and slow down innovation even more. Consider recent history. Today, broadband is available to 80% of U.S. households, but less than 20% have signed up for it. Why? Experts say high prices are keeping consumers from embracing it en masse. And prices are high, in part, because lax early enforcement of the 1996 Act helped snuff out competition. Startups had to lease lines at sky-high rates, making it nearly impossible to earn a profit. This turned Bells and local cable companies into

the only broadband players in town.

Powell's approach would enshrine this cozy arrangement, not fix it. "When you have a duopoly, you don't have aggressive competition on price," says Charles S. Golvin, a broadband analyst at Forrester Research Inc. And if Powell's reforms drive prices up, many of the same politicians who are clamoring for deregulation will be pounding on his door again, calling for price relief.

Yang covers telecommunications from Washington.



FIXING A LAW THAT MAY NOT BE BROKE

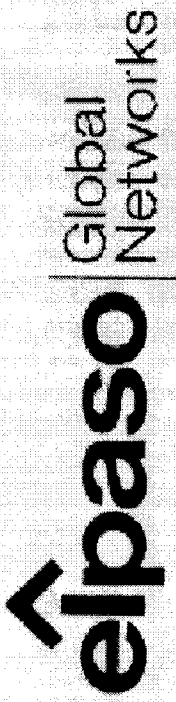
FCC Chairman Michael Powell faces pressure to ease regulations placed on Baby Bells by the Telecom Act of 1996. The argument: As long as the Bells must lease local lines to rivals at steep discounts, they'll postpone needed broadband investments.

OPPONENTS SAY:

- State by state, competition in local markets is finally picking up. AT&T is leading the charge.
- Help from the FCC will allow the Bells to retain control of the industry, stifling competition.
- If competition withers, cash-strapped Bells are unlikely to make big investments anyway.

tamper," says AT&T Chairman C. Michael Armstrong.

For Powell, son of Secretary of State Colin Powell, the pressure to act is immense. The telecom industry has imploded since he took office in January, 2001. And the Bells argue that network sharing discourages investment. They say they won't invest in massive fiber-optic upgrades, wiring broadband to millions of American homes, if they have to share these networks with competitors at cut-rate prices. BellSouth Corp. says it dropped \$85 million worth of



El Paso Global Networks Company Regulatory Briefing

El Paso Corporation



**El Paso Global Networks is a
wholly owned subsidiary of
El Paso Corporation**

- ~ North America's leading provider of natural gas services
- ~ Vertically integrated from natural gas production to transportation, trading, and power generation
- ~ Strong asset base supporting successful asset-driven business strategy

El Paso Global Networks Overview



- ~ El Paso Global Networks (EPGN) is a wholesale provider of high speed bandwidth in Texas (Dallas, Ft. Worth, Houston, San Antonio, and Austin)
- ~ EPGN has invested \$500 MM in telecom operations to support our Texas network
- ~ EPGN is collocated in over 120 SBC (Texas) Central Offices (CO) that access 80% of market
- ~ As a "hybrid carrier" EPGN:
 - Utilizes dark fiber (deployed and unused fiber) from SBC and lights it with EPGN owned and operated equipment
 - Builds company-owned fiber facilities in dense metropolitan markets
 - Provides high capacity wholesale access to carriers seeking alternatives to the Bell Operating Company (BOC)

EPGN's Metro Alternative to the BOC

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